THE SUPREME COURT
2009 TERM

FOREWORD:
FEDERALISM ALL THE WAY DOWN

Heather K. Gerken

TABLE OF CONTENTS

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We make much of "Our Federalism."[1] The Supreme Court routinely crafts doctrine to further its ends, and paeans to federalism regularly appear in law reviews. Federalism is a system that permits minorities to rule, and we are intimately familiar with its benefits: federalism promotes choice, competition, participation, experimentation, and the diffusion of power. The Court reels these arguments off as easily as do scholars.[2]

The core divide between scholars and the Supreme Court centers on sovereignty.[3] The Court consistently invokes sovereignty, and

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[1] Younger v. Harris, 401 U.S. 37, 44 (1971). For a definition of federalism, see *infra* pp. 11–102; for a defense of that definition, see *infra* pp. 112–173, 2156–3092.

[2] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458–59 (1991); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 75–106 (1995); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229 (1994); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 136–39 (2001); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 774–79 (1995); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 53–63 (2004); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–1511 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)). For the case that we reel these arguments off too easily, see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 318–19 (1997).

[3] For a definition of sovereignty, see *infra* p. 12.

scholars just as consistently deplore its invocation. Academics argue that sovereignty is in short supply in "Our Federalism." They insist that the formal protections sovereignty affords are unnecessary for achieving federalism's ends.

Even as scholars regularly announce the death of sovereignty,[4] they remain haunted by its ghost. Academics have urged the Court to move beyond sovereignty, but they continue to accept the vision of power put forward by sovereignty's champions. The de facto autonomy lauded by scholars bears a marked resemblance to the de jure autonomy lauded by the Court: both involve presiding over one's own empire rather than administering someone else's. Even as scholars resist the "separate spheres" approach that so often accompanies a sovereignty account, floating in the background of their work is the sense that states should have control over "their" policies. And sovereignty's imprint can be seen in the widespread assumption that states must possess distinct identities to function as sites of minority rule. As with a sovereignty account, the conventional image of federal-state relations pivots off of exit, not voice.[5] It is a model built on the notion that the best way to protect minorities is to give them an exit option — the chance to make policy in accord with their own preferences, separate and apart from the center.

These are perfectly sensible ways to think about parts of "Our Federalism." But because constitutional theory remains rooted in a sovereignty account, it remains disconnected from the many parts of "Our Federalism" where sovereignty is not to be had.[6] In these areas, institutional arrangements promote voice, not exit; integration, not autonomy; interdependence, not independence. Minorities do not rule separate and apart from the national system, and the power they wield is not their own. Minorities are instead part of a complex amalgam of state and local actors who administer national policy. And the power minorities wield is that of the servant, not the sovereign; the insider, not the outsider. They enjoy a muscular form of voice — the power

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[4] The tradition dates back at least to Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

[5] ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970). Thanks to Daryl Levinson for suggesting this formulation.

[6] One might be tempted to describe these areas as places where sovereignty casts no shadow. But, of course, we are always bargaining in sovereignty's shadow. *Cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). While states lack sovereignty or even a robust form of de facto autonomy in the areas I'm describing, they possess it elsewhere, and that power — and the vision of federal-state relations that accompanies it — necessarily influences what occurs in the parts of "Our Federalism" that I am describing here. Indeed, one of the goals of this Foreword is to begin thinking about the ways in which different models of state power interact with and reinforce one another. *See infra* Part III, pp. 33–44.

not just to complain about national policy, but to help set it. Here power dynamics are fluid; minority rule is contingent, limited, and subject to reversal by the national majority; and rebellious decisions can originate even from banally administrative units. I use the term "federalism-all-the-way-down" to describe the institutional arrangements that our constitutional account too often misses — where minorities rule without sovereignty.

If we were to orient constitutional theory around federalism-all-the-way-down — around voice rather than exit, integration rather than autonomy — we would find that there are new things to say about "Our Federalism." Here I name three. Each touches on a key component of any theory of decentralization: (1) where power should reside, (2) how the center and periphery interact, and (3) why decentralization that takes this form is valuable.[7] Each plays off a feature of federalism that scholars typically neglect because of their attachment to sovereignty.

First, recasting federalism as minority rule *without* sovereignty would push federalism all the way down, turning our attention to the institutions neglected by federalists and their localist counterparts. Some have called for federalism to move beyond states. But because of the hold sovereignty exerts on our collective imagination, scholars have typically stopped with cities, the institutions that most resemble states. States and cities are the institutions that best fit the exit account that dominates federalism discourse. That's because states and cities enjoy general policymaking authority, a measure of autonomy, perhaps even a robust political identity. It's easy to imagine them governing themselves, separate and apart from the center. But scholars have all but ignored special purpose institutions, the sites of minority rule that best fit the voice paradigm. These administrative units are, by definition, integrated components of a larger policymaking regime and can make no claim to formal autonomy, a self-defining community, or an empire of their own. We have thus not imagined the many institutions that constitute states and cities — juries, zoning commissions, local school boards, locally elected prosecutors' offices, state administrative agencies, and the like — as being part of "Our Federalism," let alone developed an affirmative account of the role they might play in a larger democratic system.

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[7] This Foreword will not focus on the Term's cases. Instead, like some prior Forewords, it will explore "problems of the Court's administration which are common to every term." Adrian Vermeule, *The Supreme Court, 2008 Term — Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 6 n.4 (2009) (quoting Henry M. Hart, Jr., *The Supreme Court, 1958 Term — Foreword: The Time-Chart of the Justices*, 73 HARV. L. REV 84, 84 (1959)) (internal quotation marks omitted).

Focusing on the parts of federalism where sovereignty is not to be had would lead us to rethink a second key component of federalism — how the center and periphery interact. We would conceptualize vertical checks on federal power in the same way we conceptualize horizontal checks. At the national level, we have two competing accounts of how to check a government: (1) separation of powers, which depends on separation and independence, and (2) checks and balances, which depends on integration and interdependence. For federalism, in sharp contrast, sovereignty's salience ensures that we are deeply familiar with the autonomy model. But we don't even have a name for its alternative, let alone a fully theorized cognate to the checks and balances approach. We have an account of the sovereign's power; what we need is an account of the servant's.

Third, orienting constitutional theory around federalism-all-the-way-down would help us build a more satisfying nationalist account of federalism, one that emphasizes the integrative role that discord and division can play in a well-functioning democracy. Such an account would provide a response to the two recurring arguments nationalists invoke against devolution. The first is the worry that local power is a threat to minority rights. The second is a fear of insulating local decisions from reversal even when they fly in the face of deeply held national norms. Both find their strongest support in the tragic history of slavery and Jim Crow. And both are exceedingly persuasive to anyone influenced by a sovereignty account.

If we imagine federalism as minority rule *without* sovereignty, orienting it around voice and not just exit, we can recast federalism's signature vices as plausible virtues. Federalism-all-the-way-down is not your father's federalism. It cannot be invoked to shield local discrimination from national interference, but it may play a role in promoting equality. Just as we cast states as sites of political integration because they allow national minorities to rule, so too can we cast cities and juries and school committees as sites of racial and political integration because they allow racial minorities and dissenters to rule. Federalism-all-the-way-down can provide a structural means for achieving goals traditionally associated with rights-protecting amendments like the First and Fourteenth.

Recasting minority rule without sovereignty would similarly offer an affirmative account of what has otherwise been treated as an uncomfortable fact about federalism: states can use their policymaking power to challenge, thwart, even defy the national majority. Principal-agent problems abound in federal-state interactions. Scholars of federalism have had an uneasy relationship with this fact because of its connection to sovereignty, which shields some decisions, no matter how abhorrent, from reversal. Minority rule without sovereignty is more attractive because it allows the national majority to reverse a decision if it is willing to spend the necessary political capital to do so. Freed

from the heavy costs associated with sovereignty, we might imagine that the principal-agent problem isn't always a problem. While resistance surely has its costs, minority rule at the local level generates a dynamic form of contestation, the democratic churn necessary for an ossified national system to move forward.

The nationalist account offered here emphasizes the centripetal dimensions of "Our Federalism." It depicts a system in which local politics exercise a gravitational pull on outsiders, integrating them into the broader polity. It is an account in which localities serve as staging grounds for national debates, and the decisions of the variegated periphery feed back into national policymaking — one built not on an exit option, but on a muscular form of voice. It is an account in which the energy of outliers serves as a catalyst for the center.

Here, too, my account requires a move beyond sovereignty, though here my target is the nationalists, who have long ribbed supporters of federalism for being unduly attached to sovereignty. Even as I join the nationalists in insisting on the center's ability to play the national supremacy card, my account elides the principal-agent distinction, privileges messy overlap over clear jurisdictional lines, and understands power to be fluid, contingent, and contested. I celebrate the fact that Tocqueville's democracy fails to produce Weber's bureaucracy. I argue that division and discord are useful components of an integrated policymaking regime and a unified national polity. All of these claims push up against a conception of national power that is as deeply rooted in sovereignty as is federalism's conventional conception of state power.

Three caveats are in order. First, this Foreword tries to capture the center of gravity in federalism discourse. As the footnotes make clear, there will often be exceptions to the claims I make. The point of this Foreword is not to downplay them, but to ask why they are exceptions in the first place.

Second, my account is partial in two senses. Most obviously, no paper could fully canvas the democratic benefits associated with federalism-all-the-way-down. And even a full defense of federalism-all-the-way-down would be a partial account of federalism. Federalism has always been understood to be a multi-headed beast, with courts and scholars routinely deploying multiple and conflicting accounts of what states do. I thus do not seek to displace existing accounts of federalism with my own. The alternative theories discussed in this Foreword are perfectly sensible ways to describe portions of "Our Federalism." The point is that they don't describe all of it.[8]

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[8] *Cf.* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV 1485, 1486 (1994) ("[W]hat federalism 'is,' what it 'means,' looks different depending on the area examined and the question

Finally, by offering this affirmative account, I am not denying that there are serious costs accompanying each of the benefits I describe here. But these costs are utterly familiar; rehashing them would be pointless. My claim is not that these costs are modest or irrelevant; it is that we don't have a full account of what's on the other side of the scale.

The risk in offering an affirmative account of this sort is that the reader may eventually slip into thinking that the author "really" thinks her new factors trump the well-known costs and benefits we typically consider when deciding whether to devolve power. Please don't. There is little point to reciting points with which everyone is familiar. To be sure, I could try to offer some broad generalizations about how these costs and benefits balance. But I am deeply skeptical that anything meaningful can be said at such a high level of generality. My account is devoted to underappreciated features of "Our Federalism"; it does not purport to describe all of its features. Even within the institutional arrangements I describe, costs and benefits can only be sensibly assessed institution by institution, domain by domain, issue by issue, group by group. The point is not to do the math in advance, but simply to illuminate a set of arguments that are too often excluded from the equation.

Part I argues that even as scholars reject a sovereignty account, sovereignty continues to shape the way we think about "Our Federalism." Part II shows that focusing on minority rule *without* sovereignty would push federalism all the way down to the special purpose institutions that constitute states and cities. Part III argues that orienting federalism around federalism-all-the-way-down would expand our understanding of how the center and periphery interact, helping us to develop an account of the power of the servant to compete with our existing account of the power of the sovereign. Part IV suggests that if we shed the assumption that minority rule must be accompanied by sovereignty, we can build a more convincing nationalist account of "Our Federalism."

I. THE GHOST OF SOVEREIGNTY

Federalism is an idea that depends on, even glories in, the notion of minority rule. It involves decentralized governance and a population that is unevenly distributed across two levels of government,[9] some-

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asked."). For a rich history that attests to the idea's complex and contingent nature, see generally ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM (2010).

[9] *See, e.g.*, MIKHAIL FILIPPOV ET AL., DESIGNING FEDERALISM 9 (2004); Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1313–15 (1994); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle*, 111 HARV. L. REV. 2180, 2219–22 (1998); Larry D. Kramer, *Putting the*

thing that allows national minorities to constitute local majorities. Minority rule, in turn, is thought to promote choice, competition, experimentation, and the diffusion of power.[10]

Sovereignty — which formally guarantees a state's power to rule without interference over a policymaking domain of its own[11] — has sometimes been invoked as federalism's definitional limit.[12] But while the Court continues to make much of sovereignty, most of the field has rejected the notion that it determines federalism's metes and bounds.[13] As a descriptive matter, some observe that sovereignty is in short supply in "Our Federalism."[14] For instance, they point out that many federal-state interactions take place in areas where the states and the federal government possess concurrent jurisdiction, with states often

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Politics Back into the Political Safeguards of Federalism, 100 COLUM. L. REV. 215, 223 (2000). I use the term "conventional federalism" to describe a narrower definition of federalism, one that insists that decentralization be paired with sovereignty. *See* MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 12 (2008). For those who insist on that definition, nothing turns on my use of the term "federalism." It simply provides an organizing scheme for identifying the ideas that materialize if we make the conceptual moves urged here.

[10] When I use the term "minority rule," I mean only that national minorities constitute local majorities, not that those decisions are supreme. For a defense of this view, see *infra* Parts III & IV, pp. 33–73. Most theories of federalism explicitly or implicitly depend on minority rule. For instance, states are unlikely to constitute laboratories of democracy or facilitate Tieboutian sorting if the same types of people are making decisions at the state and national levels. Similarly, ambition is unlikely to counter ambition if state and national actors are united in their ambitions.

[11] When I refer to "sovereignty," I invoke this definition unless I explicitly note otherwise. This definition lumps together two admittedly different conceptions of sovereignty: one involving freedom from interference and the other an affirmative ability to serve as a source of law and policy. *See* Young, *supra* note 2, at 13–14. While the two are conceptually different, *id.*, many assume that freedom from interference does not amount to much unless there is something to do with that freedom. I therefore join scholars of many stripes in fusing these two definitions. *See, e.g.*, Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 851 (1979); Kramer, *supra* note 9, at 229; Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1192–95 (1977).

[12] *See, e.g.*, FEELEY & RUBIN, *supra* note 9, at 12; WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 11 (1964); Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 19 (2002).

[13] *See, e.g.*, Briffault, *supra* note 9, at 1317–19; Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 346; sources cited *infra* note 15 (works by scholars of cooperative federalism); sources cited *infra* notes 20–26 (works by process federalists); sources cited *infra* note 111 (works by scholars of the political safeguards of federalism). There is a small cohort of dissenters from this line of argument, though their challenge has as much to do with the appropriateness of judicial review as with sovereignty. *See, e.g.*, Kaden, *supra* note 11; Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27 (1998). Others invoke sovereignty as federalism's definitional limit but insist that "Our Federalism" is not federalism at all. *See, e.g.*, FEELEY & RUBIN, *supra* note 9, at 12.

[14] *See, e.g.*, FEELEY & RUBIN, *supra* note 9, at 12.

administering federal programs.[15] Others resist the notion that it is possible to define a policymaking domain over which states rule separate and apart from the federal government.[16] As a prescriptive matter, others insist that the de jure autonomy sovereignty affords is unnecessary to achieve federalism's basic aims.[17] The mere fact that terms like process federalism, cooperative federalism, and the political safeguards of federalism are even comprehensible confirms that sovereignty does not mark federalism's outer bounds.

Even as scholars have rejected a sovereignty account, they remain haunted by its ghost. They continue to deploy narratives about power, jurisdiction, and identity that mirror those of sovereignty's champions. While these arguments are all perfectly sensible ways to think about portions of "Our Federalism," they fail to capture some of its more intriguing possibilities.

Before turning to the analysis, it might be worth saying a word about the terminology I'm deploying. I use the term "sovereignty" as a stand-in for a particular understanding of federal-state relations because it makes sense in terms of federalism's intellectual history. But because the term "sovereignty" has different meanings in different fields — it is even used inconsistently by federalism scholars — it may bog some readers down. If you are flummoxed by the term, imagine it loosely standing in for an idea about the best way to protect minorities in a majority system, something I discuss in greater detail in Part IV. Federalism scholars typically think that the best thing we can do for minorities is to give them an exit option, making space for them to enact their own policies separate and apart from the center.[18] This

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[15] The leaders on this front have been scholars of cooperative federalism. *See, e.g.*, DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 162 (2d ed. 1972); MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES (1966); John Kincaid, *The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy*, *in* COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 87 (Daphne A. Kenyon & John Kincaid eds., 1991); Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 YALE L.J. 1344 (1983); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001) [hereinafter Weiser, *Federal Common Law*]; Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001) [hereinafter Weiser, *Cooperative Federalism*]; Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, PUBLIUS, Spring 2001, at 15.

[16] *See, e.g.*, Briffault, *supra* note 9, at 1311; Rapaczynski, *supra* note 13, at 351.

[17] *See, e.g.*, FEELEY & RUBIN, *supra* note 9; ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 72–81 (2009); Briffault, *supra* note 9, at 1318–19; Kramer, *supra* note 9; Young, *supra* note 2.

[18] *See, e.g.*, Richard A. Epstein, *Exit Rights Under Federalism*, LAW & CONTEMP. PROBS., Winter 1992, at 147, 149; *cf.* Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 272–73 (1990) (explaining that exit strategy makes it relatively easy for parties to avoid onerous state regulations as opposed to federal regulations).

image of institutional relations emphasizes autonomy over integration, independence over interdependence, exit over voice. When I describe institutional arrangements "sheared of sovereignty," I refer to a system in which minorities are insiders, not outsiders; integrated policymakers within the system rather than autonomous policymakers outside of it; federal servants, not state sovereigns. In this system, minorities exercise "voice" in an exceedingly muscular form. Their insider status enables them not just to speak, but to act — to administer national policy as they see fit, even to resist its implementation.[19]

A. Process Federalists

Process federalists have pushed hardest against a sovereignty approach, and their arguments have rightly come to dominate the field.[20] Process federalists emphasize that power diffusion depends on preserving de facto autonomy for the states, not the de jure autonomy afforded by sovereignty. Their functional account of federal-state interactions eschews formal protections that can be enforced in court; they look to politics, tradition, inertia, and interdependence as the guarantors of state power.

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[19] Other scholars have cast debates over federalism in terms of voice and exit while pursuing different arguments than those made here. *See, e.g.*, Friedman, *supra* note 2, at 386–93; John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 107–10 (2004); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 917–20 (1994); Weiser, *Cooperative Federalism*, *supra* note 15, at 704–07; Roderick M. Hills, Jr., Federalism and Public Choice 1–3 (2009) (unpublished working paper, N.Y.U. Sch. of Law, N.Y.U. Law & Econ. Working Papers), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1175&context=nyu_lewp. Perhaps the closest analogues to the present argument can be found in brief treatments set forth in Young, *supra* note 2, at 60, which notes in passing that cooperative federalism provides opportunities for states to challenge federal programs, and R. Seth Davis, Note, *Conditional Preemption, Commandeering, and the Values of Cooperative Federalism: An Analysis of Section 216 of EPAct*, 108 COLUM. L. REV. 404, 441–46 (2008), which notes that cooperative federalism allows states to influence policy and argues that this form of voice involves more than "complaining. It would mean the opportunity to influence and check" federal regulatory policymaking, *id.* at 442. For efforts to cast local government debates in terms of voice and exit, see, for example, Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 882–87 (1983). For a more skeptical account, see Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEX. L. REV. 1, 10–12 (2001).

[20] For this reason, I use process federalism as an example. To be sure, as Rick Hills points out, process theories "are not really theories of federalism at all but theories of judicial review." Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 821 (1998); *see also* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 279 (2005). But accounts of judicial review are also accounts of how the center and periphery should interact in a federal system and thus encompass arguments about what federalism is and what purposes it serves.

Even as the process federalists reject a sovereignty account, they embrace its intellectual traveling companions. For example, while process federalists argue that sovereignty is unnecessary to protect state power, they define that power in sovereignty-like terms. The de facto autonomy lauded by the process federalists looks remarkably like the de jure autonomy lauded by sovereignty's champions. Both theories depict power as the ability to preside over one's own empire rather than to administer someone else's. For instance, Larry Kramer, who breathed new life into the "political safeguards of federalism," insists that the goal of federalism is "preserv[ing] the regulatory authority of state and local institutions to legislate policy choices."[21] Ernie Young, who offers "two cheers for process federalism," insists that "the independent policymaking authority of state governments" is "the critical variable" for federalism.[22] Andrzej Rapaczynski, who writes scathingly of sovereignty's place in federalism theory, rejects a purely administrative model of federalism because it would transform state institutions "into an extension of the federal bureaucratic machinery."[23]

The connection between the images of autonomy put forward by process federalists and by sovereignty's champions goes deeper. Process federalists emphatically resist the separate spheres approach that is so often paired with sovereignty.[24] They rightly point out that it is exceedingly difficult to draw the line between state and federal functions. Yet floating in the background of their work is a similar conception of state power — the sense that states should have de facto autonomy over "their" policies. Some argue, as does Larry Kramer, that while "it's no longer possible to maintain a *fixed* domain of exclusive state jurisdiction it's not necessarily impossible to maintain a *fluid* one."[25] Others suggest that we preserve state policymaking authority

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[21] Kramer, *supra* note 9, at 222; *see also* Kramer, *supra* note 8, at 1513 (arguing that the key question for political safeguards theory is not whether the states will exist, but whether "they will have anything to do").

[22] Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1349, 1358 n.42 (2001); *see also id.* at 1385.

[23] Rapaczynski, *supra* note 13, at 416; *see also* Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1681 (2008) (arguing that the procedural safeguards of federalism are "designed to preserve the governance prerogatives of the states"); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779, 786 (1982) (arguing that federalism requires that states have "the power to make decisions . . . [about] the package of goods and services to be provided collectively[] and the allocation of governmental resources").

[24] *See, e.g.*, Kramer, *supra* note 9, at 292; Young, *supra* note 22, at 1362.

[25] Kramer, *supra* note 8, at 1499; *see also id.* at 1500 (expressing skepticism that judges can draw these lines). Similarly, while Young suggests that we cannot identify state policymaking arenas a priori, he argues that it is essential that we leave states with "meaningful things to *do*." Young, *supra* note 2, at 52. His quarrel with the Supreme Court's sovereign immunity doctrine, for instance, is that it "does not protect a single square inch of state regulatory turf." Young, *supra* note 22, at 1376; *see also* Ernest A. Young, *State Sovereign Immunity and the Future of Fed-*

by enforcing restrictions on federal power. This strategy relies on negative space, preserving a realm of state autonomy in the space left open by limiting federal power.[26] When talking about state policymaking spheres, in short, even the process federalists think there is a there there.[27]

Sovereignty has even left its imprint on what we think is necessary for federalism to succeed. Federalists and nationalists have engaged in an often heated debate over whether states have distinct political "identities" that are sufficiently robust for them to command the loyalty of their citizens. Nationalists argue that states have no meaningful identities and command the loyalty of few.[28] Federalists respond by claiming that states have identities,[29] or that they should.[30]

What's odd about this debate is that we bother to have it.[31] Why exactly do the nationalists think it matters if they can win on this empirical point?[32] Why do federalism's champions feel the need to re-

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eralism, 1999 SUP. CT. REV. 1, 3. And even as Rapaczynski argues that states need not retain particular powers, his assumption that they must retain certain functions sounds a sovereignty theme. Rapaczynski, *supra* note 13, at 415–16.

[26] Brad Clark, for instance, argues that the Supremacy Clause and the separation of powers protect state autonomy by limiting the federal government's reach. Clark, *supra* note 23; Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001) [hereinafter Clark, *Separation of Powers*]; Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91 (2003) [hereinafter Clark, *Supremacy Clause*]. Stephen Gardbaum similarly insists that federalism should be based "not on policing definitive and categorical jurisdictional boundaries . . . but on policing Congress's deliberative processes and its reasons for regulating." Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 799 (1996). So too, Vicki Jackson — who eschews separate spheres, *see* Jackson, *supra* note 9, at 2231 — nonetheless favors policing limits on federal power. "To make political safeguards of federalism work," she writes, "some sense of enforceable lines must linger." *Id.* at 2228; *see also id.* at 2233, 2255. Some think that the Court has adopted a similar approach. *See* David J. Barron, *Fighting Federalism with Federalism: If It's Not Just a Battle Between Federalists and Nationalists, What Is It?*, 74 FORDHAM L. REV. 2081, 2096 (2006).

[27] Robert Schapiro makes the same point about process federalism as I do here, though he connects this argument to the dual-federalist impulse to favor separate spheres, SCHAPIRO, *supra* note 17, at 88, which I treat as a subsidiary tenet of sovereignty.

[28] FEELEY & RUBIN, *supra* note 9, at 110–23; SCHAPIRO, *supra* note 17, at 25–30; Cross, *supra* note 12, at 39; James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 818 (1992).

[29] ELAZAR, *supra* note 15, at 10–23, 84–126; Baker & Young, *supra* note 2, at 150 n.335; Jackson, *supra* note 9, at 2221. *But see* Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1724–25 (2002) (modulating this position).

[30] Ernest A. Young, The Volk of New Jersey? Sovereignty and Political Community in Europe and the United States 14–15 (Summer 2008) (unpublished manuscript) (on file with the Harvard Law School Library).

[31] At the very least, the debate has generated the field's best titles. *Compare* Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37 (2001), *with* Young, *supra* note 30.

[32] It is plausible that federalism might work more efficiently if interests coincided more precisely with state boundaries, but that is hardly a knockout blow in legal scholarship, which builds

spond? After all, in a world of competitive party politics and lumpy residential patterns,[33] it is perfectly plausible to think that federalism can work even if states are simply convenient sites through which regionally concentrated interests organize, politic, and compete.[34] As a practical matter, this lesson has not been lost on political entrepreneurs, who routinely use local sites as staging grounds for national debates.[35] As a prescriptive matter, virtually all of the theories preoccupied with experimentation and choice function perfectly well in the absence of a self-defining People. Even the variants of federalism most closely tied to sovereignty — those that depict the states as sources of resistance and checks on federal power — can function if political competition is robust, as the political party out of national power will use whatever local weapons it possesses to challenge its rival. Indeed, a good number of scholars have lauded federalism on precisely these grounds.[36]

Yet, when pressed, even the process federalists reject the idea — endorsed by those in other fields — that states are simply "a constellation of currently existing political and partisan forces."[37] Herbert Wechsler and Jesse Choper, the early process federalists, are routinely rebuked by their intellectual heirs for conflating the political interests

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normative theories around what is, not what might be. Nor does this possibility explain why these arguments generate so much heat.

[33] One might add that we need a guarantee that the national government won't respond to challenges by dissolving the states, a guarantee that some think defines the metes and bounds of federalism. *See* Briffault, *supra* note 9, at 1335–44; Jackson, *supra* note 9, at 2217–19; Merritt, *supra* note 2; Rapaczynski, *supra* note 13, at 362. As a practical matter, however, it is unlikely that California is going to eliminate San Francisco or that the states are going to rid themselves of their juries any time soon. In making this argument, I am necessarily relying on a thin version of de facto autonomy. Given that autonomy is not a binary concept, but instead falls along a continuum, I think it's possible to accept this narrow claim without calling into question the basic arguments in this Foreword.

[34] *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 938–46 (2005).

[35] *See, e.g.*, Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).

[36] Consider Young's work analogizing states to the "shadow governments" found in European systems, Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1285–87 (2004); *see also* Merritt, *supra* note 2, at 7; Amar's discussion of the role states play in monitoring federal officials and training the loyal opposition, Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 499–505 (1991); *see also* Baker & Young, *supra* note 2, at 137–38; Rapaczynski's depiction of local power as a "counterbalance" to federal lockup, Rapaczynski, *supra* note 13, at 386–88; Jackson's observations about the usefulness of "direct[ing] political activism and organizing" to states precisely because their borders do not map on to divisive political identities, Jackson, *supra* note 9, at 2221–23; *see also* Calabresi, *supra* note 2, at 763–64; Resnik's work on localism's role in promoting international rights and transnational cooperation, Resnik, *supra* note 35; and Levinson's work on the role political parties play in diffusing power vertically, Levinson, *supra* note 34.

[37] Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 653 (1998).

concentrated in the state with the institutional interests of the state. Young, for instance, insists that we should focus "upon protection of the institutional interests of state governments rather than the representation of private interests that happen to be geographically concentrated."[38] Kramer even asserts that "[s]o far as I am aware, *no one* defends federalism on the ground that it makes national representatives sensitive to private interests organized along state or local lines. Rather, federalism is meant to preserve the regulatory authority of state and local institutions to legislate policy choices."[39]

The debate is another vestigial remain of sovereignty.[40] Only a sovereign needs a volk.[41] The idea that federalism works only if states constitute self-defining communities harkens back to the days when states were sovereign in this strong sense, with robust identities and "Peoples" of their own.[42]

B. Minding the Gap

Process federalism offers a completely sensible way to think about parts of "Our Federalism." But because it remains rooted in sovereignty, it cannot bridge the gap between constitutional theory and the work being done by social scientists and public law scholars on the parts of "Our Federalism" where sovereignty is not to be had. Social scientists have long written on the integration of state and federal policymaking regimes.[43] The same is true of public law scholars who do work on consumer protection,[44] environmental law,[45] financial regula-

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[38] Young, *supra* note 22, at 1357; *see also* La Pierre, *supra* note 23, at 786.

[39] Kramer, *supra* note 9, at 222 (emphasis added).

[40] One might argue that everything will eventually be nationalized if no one is looking out for the states qua states. But as Kramer points out, "groups that have gained a foothold in the states are unlikely to want to give it up or see it weakened too much." Kramer, *supra* note 8, at 1548. Policy fights will thus inevitably be intertwined with arguments about who gets to choose the policy. As long as there are groups out of national power, there will be defenders of local power. *Cf.* Richard C. Schragger, *Decentralization and Development*, 97 VA. L. REV. (forthcoming 2010) (manuscript at 28) (on file with the Harvard Law School Library) ("[T]he shifting of powers up and down the scale of government is a proxy for political battles that have nothing to do with local power.").

[41] Thanks to Paul Kahn for pushing me on this point.

[42] Robert Schapiro traces this debate back to dual federalism's emphasis on separate spheres. SCHAPIRO, *supra* note 17, at 83 ("To justify separating state and federal realms and creating enclaves protected from federal regulation, dualism seeks to endow states with strong identities."). In my view, the real push here is sovereignty (here in its thickest form).

[43] *See* sources cited *supra* note 15.

[44] *See, e.g.*, Thomas McGarity, *The Regulation–Common Law Feedback Loop in Nonpreemptive Regimes*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 235 (William W. Buzbee ed., 2009).

[45] *See, e.g.*, David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2007); William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1 (1997); William W. Buzbee, *Contextual Environmental Fed-*

tion,[46] law enforcement,[47] telecommunications[48] and the like. These accounts of "Our Federalism" focus on a subset of the institutional arrangements that I term federalism-all-the-way-down. Here states exercise a muscular form of voice in the national system; they serve as policymaking insiders rather than autonomous outsiders and thus can *make* national policy rather than just complain about it. These institutional arrangements feature a powerful national government with its finger in every regulatory pie, integrated and interdependent state and federal regimes, states wielding power that is not their own, and a complex administrative structure involving a variegated set of state and local decisionmakers.

The social science and public law scholarship doesn't bridge the gap either. What is typically missing from this work is what distinguishes constitutional theory from its competitors: a broad-gauged, normatively inflected argument linking these institutional features to larger questions of democratic design.[49] Social scientists traditionally write in a welfarist vein; they focus on externalities, regulatory competition, and comparative policymaking competence while eschewing normative debates and democratic theory. Public law scholars are more likely to write in a normative cadence, but for obvious reasons they tend to focus on improving policymaking in a discrete subject area rather than theorizing about how these sites of minority rule interact with the broader polity.

In recent years, a handful of academics have begun to develop something akin to the type of account I have in mind. These arguments — which run under the rubrics of cooperative federalism, interactive federalism, polyphonic federalism, and the like[50] — are all

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eralism, 14 N.Y.U. ENVTL. L.J. 108 (2005); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097 (2009); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996); Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189 (2002).

[46] *See, e.g.*, Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006); Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107 (2004).

[47] *See, e.g.*, Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 379 (2006).

[48] *See, e.g.*, Weiser, *Federal Common Law*, *supra* note 15; Weiser, *Cooperative Federalism*, *supra* note 15.

[49] *Cf.* Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181, 183 (1998) ("Non-federal implementation of federal law has slipped into American constitutional practice with relatively little theoretical explanation or justification.").

[50] *See, e.g.*, sources cited *supra* notes 45–47; *see also* William W. Buzbee, *Introduction*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION, *supra* note 44, at 1; SCHAPIRO, *supra* note 17; Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004) [hereinaf-

premised on the idea that we need to develop new conceptual tools to understand the many areas where sovereignty is not to be had.

While my account begins with the same premise, it moves in a quite different direction. Cooperative federalists and their intellectual heirs dwell, as the moniker suggests, on the cheerier elements of federal-state interactions — the ways in which joint regulation promotes mutual learning, healthy competition, and useful redundancy. This work represents the rough cognate to accounts of constitutional federalism that emphasize its policymaking benefits — those that depict states as laboratories of democracy, sources of innovation, and regulatory rivals.

My arguments, in contrast, turn to the uncooperative dimensions of cooperative federalism and the democratic elements of these bureaucratic arrangements.[51] I thus limn the theories that make up the other half of constitutional federalism — those that emphasize the role that minority rule plays in shaping identity,[52] promoting democracy,[53] and diffusing power.[54]

My account also differs in several specific respects from earlier work. First, whereas these scholars typically confine themselves to federal-state interactions, I both insist that federalism must be pushed all the way down and link our failure to do so to the hold that sov-

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ter Chemerinsky, *Empowering States*]; Erwin Chemerinsky, *Federalism Not as Limits, but as Empowerment*, 45 KAN. L. REV. 1219 (1997) [hereinafter Chemerinsky, *Federalism Not as Limits*]; Daniel C. Esty & Damien Geradin, *Regulatory Co-opetition*, 3 J. INT'L ECON. L. 235 (2000); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503 (2007). While Rick Hills has not offered a catchy moniker, he has generated so much good scholarship along these lines that his work deserves a specific acknowledgement and is cited heavily throughout this piece.

To be fair, some of these accounts may be too narrow-gauged to serve as counterparts to constitutional federalism, either because their primary focus is on policymaking within a discrete subject area or because they dwell entirely on federalism's technocratic benefits. At the very least, however, they are moving in this direction. Others fit clearly within the ambit of constitutional federalism even if they do not limn the same themes that I do.

[51] While Rick Hills has largely focused on the cooperative dimensions of cooperative federalism, *e.g.*, Hills, *supra* note 20 (arguing in favor of an anticommandeering rule because it promotes better bargaining between state and federal officials), he occasionally celebrates the more contentious dimensions of federal-state relations, *see, e.g.*, Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 28 (2007) [hereinafter Hills, *Against Preemption*] (proposing that an antipreemption rule favors "a political donnybrook — a visible and direct confrontation on a hotly contested policy issue"). Even that work, however, pursues different arguments than those made here.

[52] *See, e.g.*, Amar, *supra* note 36, at 505–09; Calabresi, *supra* note 2, at 763–65; Jackson, *supra* note 9, at 2221–23.

[53] *See, e.g.*, SHAPIRO, *supra* note 17; Amar, *supra* note 36, at 499–504; Baker & Young, *supra* note 2, at 137–38; Young, *supra* note 36, at 1285–87.

[54] *See, e.g.*, Printz v. United States, 521 U.S. 898, 921 (1997); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); Amar, *supra* note 36, at 499–504; Merritt, *supra* note 2, at 4; Rapaczynski, *supra* note 13, at 380–95; Young, *supra* note 36, at 1285–87.

ereignty exerts on our collective imagination. Second, I offer a distinctive theory of how the center and periphery interact, one that draws connections between federalism on the one hand and checks and balances on the other. Finally, I provide a normative defense of "Our Federalism" that is quite unlike that put forward by others, one that uses federalism's structural lens to examine issues that have been the all but exclusive focus of scholars of the rights side of the Constitution.[55]

II. PUSHING FEDERALISM ALL THE WAY DOWN

Orienting federalism around the institutional arrangements where sovereignty is not to be had would give us something new to say about the sites of decentralization. Federalism scholars have typically confined themselves to states, the only subnational institutions that possess sovereignty.[56] But the moment one imagines federalism without sovereignty, local institutions immediately spring to mind. Indeed, the Supreme Court itself has often (if unreflectively) treated local institutions as undifferentiated stand-ins for the state.[57] And a literature that looks a great deal like federalism — one preoccupied with interactions between the center and its variegated periphery — has developed around cities. Unsurprisingly, those critical of federalists' penchant for sovereignty have already linked these two fields, arguing that those interested in federalism should move beyond states.[58]

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[55] Robert Schapiro, who does some of the best work in this area, has put forward the closest account to mine. We both think that it is perfectly acceptable for the national government to play the supremacy card while insisting that a national system can withstand a substantial amount of variation and inconsistency. Our accounts diverge, however, along all of the dimensions I discuss above. Most notably, while Schapiro mentions in passing the possibility that state and national governments "may be competitive, or even confrontational," SCHAPIRO, *supra* note 17, at 90, his normative account dwells entirely on the peaceable features of federal-state interactions, *id.* at 97–108, and he pulls back from endorsing state contestation, *see* Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133, 2142 (2006).

[56] Those who emphasize federalism's participatory values are the exception to this rule. Because states are so large, scholars who write about bringing governance closer to the people often segue into discussions of lower-level institutions. *See, e.g.*, SHAPIRO, *supra* note 2, at 91–94; Friedman, *supra* note 2, at 389–91; Kaden, *supra* note 11, at 853–54; Merritt, *supra* note 2, at 7–8; Rapaczynski, *supra* note 13, at 402, 415–16.

[57] *See, e.g.*, *Printz*, 521 U.S. 898; Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

[58] One of the most compelling arguments is set out in Richard Briffault's characteristically thoughtful article, *"What About the 'Ism'?"*, *supra* note 9; *see also* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 489–91 (1999); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 990–1000 (2007); Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL'Y REV. 187, 208–09 (1996); Kramer, *supra* note 8, at 1488 n.5; McConnell, *supra* note 2, at 1511; Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 621–23 (2001); Ryan, *supra* note 50, at 613.

We have not, however, carried that insight to its logical conclusion. Scholars have moved beyond states, but stopped with cities. They have thus neglected the special purpose institutions (juries, school committees, zoning boards, local prosecutors' offices, state administrative agencies) that constitute states and cities. We typically don't think that these substate and sublocal institutions fall into the same category as states or cities, let alone have an account of how the center and periphery interact.[59] That is true even though most of the arguments about why we delegate decisions to the states (promoting competition, participation, experimentation, and the like) have already been applied all the way down by academics in other fields. What's missing (other than the honorific of being named part of "Our Federalism") is the type of account that makes federalism and localism distinctive — a broad-gauged, democratic account of how these nested governmental structures ought to interact. The reason for this neglect is the hold that sovereignty continues to exert on our collective imagination — the sense that federalism is designed to promote exit over voice.

A. Why Stop with States?

There has been a long and not-so-merry war about what, precisely, distinguishes "Our Federalism" from other forms of decentralization. Federalism depends on two levels of government and a population that is unevenly distributed across them, something that allows national minorities to constitute local majorities. The same is true of many theories of decentralization.

Why, then, do federalism scholars stop with states? In addition to sovereignty, many point to the formative role states played in the

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[59] A claim that one should push federalism down, of course, raises the question of how far down. In theory, we could push federalism down to private associations, even to individuals. *Cf.* Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 FORDHAM L. REV. 769 (2006) [hereinafter Hills, *Westphalian Liberalism*]. We are well aware, for instance, of the role that private institutions play in public governance, *see, e.g.*, Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000), and the fact that private organizations — like states — serve as intermediaries between citizens and the national government, *see, e.g.*, Baker & Young, *supra* note 2, at 136; J. Harvie Wilkinson III, *Is There a Distinctive Conservative Jurisprudence?*, 73 U. COLO. L. REV. 1383, 1392–98 (2002). Here I stop with the sublocal and substate sites of governance because I am playing off the literature on federalism. Thus, like federalism scholars, I focus on collective self-governance and decisions that are authoritative and public rather than particular and private. While this choice means relying on the unstable distinction between the public and private, *see* Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 191 n.10 (2005) [hereinafter Hills, *Is Federalism Good for Localism?*], the fact that lines are hard to draw doesn't mean that the categories undergirding the distinction are meaningless. There is more to be said about the relationship between these arguments and the private realm, *see, e.g.*, Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347 (1997); Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 148–53 & n.10 (2003) [hereinafter Hills, *Private Governments*], but I leave that for another day.

Founding, one inscribed in the Constitution. But neither the Constitution's text nor its structure offers definitive guidance on how to referee federal-state interactions. And just as sovereignty no longer plays the same role in our constitutional order, the role of states has changed. We have moved from a state-centered federalism to a nation-centered one.[60]

We have already recognized these facts. Neither originalism nor textualism drives the theory.[61] When courts decide contests between the states and the federal government, they turn to functional accounts that are keyed to the role states play in preserving a well-functioning democracy.[62]

B. Why Stop with Cities?

Given federalism's focus on the functional, it is not surprising that some have called for federalism to move beyond states,[63] and many have made that move.[64] Most of the functional accounts we have for ceding decisions to states apply to local institutions.[65] Indeed, some think that localities represent *better* sites for pursuing federalism's values because they are closer to the people, offer more realistic options for voting with one's feet, and map more closely onto communities of interest.[66]

But just as federalists stop with states, localists stop with cities. They typically don't put special purpose institutions into the same category as states or cities.[67] The same is true of courts. Judges routinely

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60 *See, e.g.*, SCHAPIRO, *supra* note 17, at 21–24, 31–53 (tracing the evolution of American federalism from the early republic through the twenty-first century). This claim is a normative as well as a descriptive one. *See* Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L. 259, 259 (2004) (Behind contests over sovereignty "lies the deeper question of the character and meaning of political identity.").

61 *See, e.g.*, SCHAPIRO, *supra* note 17, at 109; Briffault, *supra* note 9, at 1304 (noting the "erosion" of these ideas); Jackson, *supra* note 9, at 2215; Rapaczynski, *supra* note 13, at 345.

62 Briffault, *supra* note 9, at 1303–04.

63 *See id.* at 1304 (The shift from formalism to the "values of federalism" has, "paradoxically, moved the focus of federalism away from the states." (emphasis omitted)).

64 *See, e.g.*, *id.* at 1304–05, 1311–16, & 1315 n.43 (collecting sources).

65 *See, e.g.*, *id.* at 1304; Davidson, *supra* note 58, at 1005–17.

66 *See, e.g.*, Briffault, *supra* note 9, at 1305; Gordon, *supra* note 58, at 218.

67 One of the major exceptions is Rick Hills, who includes substate institutions within federalism's ambit. *E.g.*, Hills, *Private Governments*, *supra* note 59, at 186; Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201 (1999) [hereinafter Hills, *Dissecting the State*]. Others have grouped special purpose institutions with states and cities without classifying them as part of "Our Federalism." *See, e.g.*, Theodore W. Ruger, *Preempting the People: The Judicial Role in Regulatory Concurrency and Its Implications for Popular Lawmaking*, 81 CHI.-KENT L. REV. 1029, 1031 (2006) (discussing popular lawmaking); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1811 (2004) (examining the local dimensions of religious liberty); Wilkinson, *supra* note 59, at 1392–98 (discussing intermediary organizations between the individual and the nation).

referee disputes involving juries,[68] school boards,[69] state agencies,[70] state attorneys general,[71] locally elected sheriffs,[72] and the like. In order to do so, the courts need an account of what, precisely, these institutions do. But, with the exception of cities, the arguments the courts deploy turn largely on domain-centered accounts. Judges think that juries just render verdicts, school committees just administer education policy, and so on. What is missing is what federalism and localism provide — an account of how these sites of minority rule interact with the center in a healthy democratic system.

You might think that special purpose institutions simply don't interact with the larger polity — that each is a tub on its own bottom. But controversies bubbling up from these institutions can catalyze national debate. Consider the recent controversies over the Islamic community center near Ground Zero brewing before a New York City zoning commission;[73] the attempt of a school board in Dover, Pennsylvania to teach intelligent design;[74] the kerkuffles in Kansas over the status of evolution in the schools;[75] or the efforts of the Texas Board of Education to reorient its history curriculum.[76] Other forms of rebellion also reach national elites, even if they don't make national headlines. When state bureaucrats refuse to implement a federal program properly or hijack that program for their own ends, they send a message to Washington policymakers about the future of federal law. Even the day-to-day work of these special purpose institutions shapes our civic culture. Zoning commissions and school committees, for instance, often feature robust rates of local participation and influence, the basic building blocks of our communal life. Think, for instance, about why the Christian Right devoted so many resources to taking over local school boards, or how the aggregate effects of countless zoning decisions have shaped how Americans live and interact. Or consider the fact that the implementation of federal programs that have a

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68 *E.g.*, Batson v. Kentucky, 476 U.S. 79 (1986); Wainwright v. Witt, 469 U.S. 412 (1985).

69 *E.g.*, Milliken v. Bradley, 418 U.S. 717 (1974); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

70 *E.g.*, Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004).

71 *E.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); *see also* Trevor W. Morrison, *The State Attorney General and Preemption*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION, *supra* note 46, at 81.

72 *E.g.*, Printz v. United States, 521 U.S. 898 (1997).

73 Michael Barbaro & Javier C. Hernandez, *Mosque Plan Clears Hurdle in New York*, N.Y. TIMES, Aug. 4, 2010, at A1.

74 Laurie Goodstein, *Schools Nationwide Study Impact of Evolution Ruling*, N.Y. TIMES, Dec. 22, 2005, at A20.

75 Jodi Wilgoren, *Kansas Board Approves Challenges to Evolution*, N.Y. TIMES, Nov. 9, 2005, at A14.

76 Michael Brick, *Texas School Board Set to Vote Textbook Revisions*, N.Y. TIMES, May 21, 2010, at A17.

real impact on the day-to-day lives of Americans — social security or OSHA — varies noticeably from state to state.[77] And yet we continue to deny these institutions the honorific of being included in "Our Federalism" and neglect them as such.

C. What's in a Name?

Lest you think this is a nominalist quarrel, let me emphasize the substantive dimension to this claim. Although we have thought about the basic justifications for devolution in the context of special purpose institutions, we haven't built up the other half of federalism theory: a normative account of how the center and its variegated periphery should interact. As noted above, much of federalism (and localism) is preoccupied with the broad-gauged institutional design questions that arise from the interactions between nested governing structures. Arguments about these issues run under the rubrics of sovereignty, process federalism, home rule, and the like. But we lack a set of common terms — let alone a full-blown theory — for the sites that fall just below states and cities on the governance flow chart.[78] As a result, those interested in broad-gauged institutional design questions write about states or cities, leaving the study of special purpose institutions to specialists.[79] Land use experts write about zoning commis-

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[77] Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 142–44 (Michael W. Dowdle ed., 2006); John T. Scholz et al., *Street-Level Political Controls over Federal Bureaucracy*, 85 AM. POL. SCI. REV. 829 (1991).

[78] Here I'll borrow Richard Briffault's pithy assessment of the literature: "There is very little that considers these bodies and [their] interactions as part of an overarching system, and what little there is either applauds the opportunity for competition or worries about the difficulties of coordination . . . ." Email from Richard Briffault, Joseph P. Chamberlain Professor of Legislation, Columbia Law Sch., to author (Apr. 4, 2010) (on file with the Harvard Law School Library).

[79] Even localism looks a bit narrow when compared to federalism. Federalism scholars deploy multiple and conflicting accounts of what states do. But much as scholars of single-subject institutions emphasize good policymaking within a given subject area, localists focus heavily, but not exclusively, on the production of local benefits. The disagreement within the field turns on precisely which local benefits matter most. *See* Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 5 (1990) [hereinafter Briffault, *Our Localism: Part I*]; Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977–78). Some emphasize the importance of participation and community building. *See, e.g.*, GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999) [hereinafter FRUG, CITY MAKING]; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1069–72 (1980); Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23 (1998). Others, building on Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956), focus on the provision of local services and choice. *See, e.g.*, WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001); *cf.* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977). A few scholars, however, have considered the role that cities play in national debates. *See* Barron, *supra* note 58,

sions, environmental law scholars write about the state bureaucracies, and so on. When these academics write about institutional design, they are typically focused on improving policymaking in a discrete subject area (producing good education policy or rational zoning regulations) rather than on creating a well-functioning democratic scheme.[80]

D. Sovereignty and the Neglect of Special Purpose Institutions

Our attachment to sovereignty may explain this omission. Localists are well aware that sovereignty is not a precondition for decentralized units to exercise power against the center.[81] Yet many replay the battle over sovereignty for institutions that can make some claim to it (cities),[82] and virtually all neglect the special purpose institutions that plainly lack it (juries, school committees, zoning commissions, administrative agencies, local prosecutors' offices, and the like).[83] Even those who reject the sovereignty model still adhere to its depiction of power as presiding over one's own empire.[84] We similarly see the notion of

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at 487–90; Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1 (2006); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005); Schragger, *supra* note 67; *see also* Matthew A. Shapiro, The Constitution in City Hall: Interpretation of the U.S. Constitution by Local Officials and Communities (Apr. 4, 2005) (unpublished B.A. thesis, Woodrow Wilson School of Public and International Affairs) (on file with the Harvard Law School Library) (tracing the history of local constitutionalism and offering a skeptical view).

80 There are some exceptions, however. *See, e.g.*, BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS (William G. Howell ed., 2005) (school boards); Lisa M. Card, *One Person, No Vote? A Participatory Analysis of Voting Rights in Special Purpose Districts*, 27 T. JEFFERSON L. REV. 57, 79 (2004) (special purpose districts); Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLA J. ENVTL. L. & POL'Y 293 (2001–02) (zoning); Eric H. Steele, *Participation and Rules — The Functions of Zoning*, 1986 AM. B. FOUND. RES. J. 709 (zoning); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969 (2008) (locally administered criminal justice); Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States* (N.Y.U. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 10-14, 2010), *available at* http://ssrn.com/abstract=1559251 (criminal law); *see also infra* note 94 (collecting sources for juries).

81 *E.g.*, Briffault, *supra* note 9, at 1318; Briffault, *Our Localism: Part I*, *supra* note 79, at 11–12.

82 The fight over home rule is the best example. David Barron traces the intellectual roots of this argument, finding that "a commitment to home rule that once served as a catalyst for imaginative and even contradictory constructions of local power has come to represent a commitment to protecting a city's or suburb's autonomy to control its own affairs without state interference." David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2264 (2003).

83 Richard Briffault has written on economic institutions at the sublocal level. Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365 (1999); Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503 (1997).

84 *See, e.g.*, David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2223 (2006) (Cities should confine themselves to "problem-solving on matters that are within their capacity to resolve through the exercise of their own policymaking authority.").

separate spheres, sovereignty's long-time traveling companion, creeping into localists' work. In their self-conscious moments, localists reject the notion that one can delineate spheres of influence or regulatory domains.[85] But they often return to the idea that "the local" belongs to cities and that we must shield this local domain from state invasion.[86] As with the arguments made by the process federalists, these are perfectly sensible accounts for describing local power. But they cannot describe all of it, precisely because they remain rooted in a sovereignty account.

It's easy to see, then, why cities are the all but exclusive focus of localism and are so often placed in the same category as states. Not only are cities the rare local units that can claim anything akin to sovereignty,[87] but we can imagine them as robust sites of self-governance. While cities' authority is limited, they possess the same type of general jurisdiction that the states possess. We can thus envision them governing separate and apart from the state, just as proponents of sovereignty envision states governing separate and apart from the nation.[88] We can think of cities as meaningful exit options for minorities, just as we do with states.

Special purpose institutions, in sharp contrast, seem like unlikely sites for thinking about "Our Federalism" to anyone influenced by a sovereignty account. Even substate and sublocal institutions that possess considerable discretion are understood to be administrative units of the state, thus eliminating any sense that those who control them are presiding over their own empire. These institutions can be quite powerful, but the power they wield is not their own. Moreover, because these institutions lack the general policymaking authority enjoyed by cities and states, there is no sense that those who control them are engaged in self-governance separate and apart from the center. Special purpose institutions, in short, provide minorities with a chance to exercise voice inside the system, not to set policy outside of it.

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[85] *See, e.g.*, Gerald E. Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553, 556 (1987).

[86] David Barron and Jerry Frug are exceptions. Barron, for instance, insists that local autonomy is relational: "[N]o city or state is an island jurisdiction. The ability of each locality to make effective decisions on its own is inevitably shaped by its relation to other cities and states . . . and, most importantly, by the way the central power structures these relations . . . ." David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 378–79 (2001); *see also* GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 31–52 (2008).

[87] Many cities enjoy "home rule" provisions whose utility is a subject of intense debate in local government law. *Compare* Barron, *supra* note 82, David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 J.L. & POL. 261 (2005), *and* Frug, *The City as a Legal Concept*, *supra* note 79, *with* Briffault, *Our Localism: Part I*, *supra* note 79.

[88] *Cf.* Davidson, *supra* note 58, at 965.

To the extent that one subscribes to the thicker account of sovereignty discussed above,[89] administrative units are certainly an odd fit for federalism. While it's possible to imagine cities as sources of self-definition and sites of political allegiance, it's hard to say the same of special purpose units. Being a resident of San Francisco might mean something. But no one defines himself based on the jury on which he happened to serve or the zoning commission that happens to govern him. The identity these institutions inspire — like the power they wield — is all but entirely derived from the larger system of which they are a part.

The failure to push federalism all the way down may also have something to do with the longstanding relationship between sovereignty and minority rule, which I detail in Part IV. If there is something that distinguishes constitutional federalism from more technocratic accounts of decentralization, it is that federalism celebrates the role minority rule plays in fostering healthy resistance and checking national power.[90] But one might think that minority resistance is destined for failure if it is not shielded from reversal, that exit and autonomy matter a good deal more than voice and integration when the rubber hits the road. We can thus conceive of rebellious states and cities, which are protected by de jure or de facto autonomy, but a rebellious administrative unit might seem like a contradiction in terms. Why develop a theory of how the center and periphery interact if you think the center will always win? That's a question I take up in Parts III and IV.

E. Widening Federalism's Lens

Once we orient federalism around the institutional arrangements where sovereignty is not to be had, federalism naturally morphs into federalism-all-the-way-down. Like cities and states, substate and sublocal institutions can serve as sites of minority rule and sources of dialogue, dissent, and resistance. To be sure, these institutions are servants rather than sovereigns, administrative units integrated into a broader system rather than institutions capable of regulating separate and apart from the center, temporary and contingent sites of minority rule rather than governments capable of commanding the loyalty of a People. But, as I argue in Parts III and IV, none of these features prevents these institutions from promoting the broader democratic values associated with minority rule.

1. The "Apples to Apples" Problem. — One might fairly protest that the real reason we haven't pushed federalism theory all the way down is that substate and sublocal institutions are so varied. Federal-

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[89] *Supra* p. 18.

[90] Amar, *supra* note 36, at 498.

ism and localism seem more manageable, as they both focus on one type of institution, not many.

The problem with this "apples to apples" argument is not the obvious point that states and cities vary dramatically in size and influence. The problem is that states and cities contain multitudes, precisely the multitudes that fall within the ambit of federalism-all-the-way-down. When "the state" interacts with federal officials, it may be its cities, its legislature, its prosecutors, its school committees, even its local sheriffs doing the interacting. If diversity is a problem for federalism-all-the-way-down, it is a problem for federalism and localism as well.

If we think that the study of substate and sublocal institutions should be confined to domain-centered fields (school committees are a topic for educational experts; environmental agencies are best studied by scholars of environmental law), the same might be said of cities and states. Federalism scholars, for instance, tend to treat "the state" as an institutional it, not an institutional they.[91] But the federal-state interactions on which they wax eloquent take place within bureaucratic, representative, and participatory structures; they take place in sites of general jurisdiction and special purpose institutions; and they involve policymaking in a variety of domains. We could easily imagine confining ourselves to domain-centered accounts when we think about cities and states, just as we do for special purpose institutions.

The vibrancy of fields like federalism and local government law, however, suggests that something can be gained from moving the study of cities and states beyond a domain-centered account. The same may well be true of the special purpose institutions that constitute them.

None of this is meant to deny that there are differences between these governance sites, any more than the existence of federalism theory is meant to deny that states themselves are variegated. The question is simply whether the differences between these institutions are so stark that they preclude discussion of their similarities. Here, at least, we have evidence that the differences are not so stark. Not only have most of the functional accounts for state power been applied all the way down, but there is also a marked similarity in the rules of

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[91] Everyone, of course, uses the term "the state" for ease of exposition. The point here is that the substance of the scholarship exhibits this tendency, with the exception of work by academic foxes like Rick Hills, whose scholarship shows how much can be gained from mining this line of analysis. *See, e.g.*, Hills, *Against Preemption*, *supra* note 51; Hills, *Dissecting the State*, *supra* note 67; Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225 (2001); Hills, *supra* note 49; Hills, *Is Federalism Good for Localism?*, *supra* note 59; *see also* Daniel B. Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, 14 YALE L. & POL'Y REV. 149 (1996).

thumb used to decide who should decide: If there are economies of scale, vest the decision with the centralized decisionmaker. If you want to promote experimentation or choice, let the decentralized units decide. If you care about externalities, look up. If you care about participation, look down.

Why not go whole hog and acknowledge that "Our Federalism" extends all the way down? Why not think of juries and school committees and zoning commissions and administrative agencies as producing national democratic goods, not just local ones? Why not develop an account of how the center interacts with a variegated periphery, just as we do with cities and states? Why not extend these institutions the honorific of "Our Federalism" as well as the sustained attention of scholars interested in democratic design writ large?

Even to the extent that special purpose institutions are different from cities and states, this may be an advantage for thinking about the ways in which minority rule furthers a broad set of democratic aims. If federalism embodies an antifractalization principle[92] — if it rests on the assumption that democracy benefits when the decisionmakers at one level of government are not statistical mirrors of the other — then special purpose units take that principle one step farther. The institutions that make up federalism-all-the-way-down ensure variation in the identity of the decisionmakers *and* in the context in which a decision is made. Some feature direct participation by everyday citizens, some are small and deliberative, some reach decisions unmediated by political parties or electoral politics, and some sound in a bureaucratic cadence. Some allow durable minorities to rule; others empower transitional minorities. To the extent that the majority and minority disagree, federalism-all-the-way-down allows them to revisit that conflict in different contexts featuring different power dynamics.

2. An Example: Rethinking the Jury. — This is a bit abstract, so let me offer a concrete example of how we might think differently about local institutions if we grouped them into the same category as states, depicting them not just as discrete policy producers, but as sites of minority rule interacting with a broader polity. Here I use the jury as an example.[93] That's not because I am trying to make the case here

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[92] Thanks to Scott Shapiro for suggesting the analogy. *But see* FEELEY & RUBIN, *supra* note 9, at 13–14 (arguing that an important feature of federalism is that "the structure of the national government . . . and its geographically defined subsidiaries reiterate each other").

[93] One might think the jury is an odd choice for discussing minority rule in heterogeneous bodies because most juries are governed by a unanimity rule. But group dynamics strongly influence jury deliberations. As a result, the swing vote for a jury is closer to the middle juror than to the hypothetical holdout. *See, e.g.*, Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 692 (2001); Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 J. PERSONALITY & SOC. PSYCHOL. 21 (1988). The jury is unlike most other

that, all things considered, juries are an optimal site for promoting minority rule. It's because our account of the jury's role has the sharpest edges. It is so well refined and so strongly opposed to federalism's insights that it nicely illustrates the gap between the way we talk about states and the way we talk about special purpose institutions.

Without a vision of federalism-all-the-way-down, we typically think that the jury's sole purpose is to render verdicts.[94] That vision leads us to emphasize consistency across cases, a normative commitment that is flatly at odds with how juries are actually constituted. When we think about jury composition, we gravitate to the diversity ideal,[95] which suggests that each jury should be a statistical mirror of the community from which it's drawn. In fact, the contours of jural districts, the random draw, and prohibitions on racial balancing ensure that many juries look nothing like their communities. Despite these institutional practices, we insist that this variation is a bug, not a feature.[96]

An account of federalism-all-the-way-down would push us to reimagine the jury's role. Juries would be seen not as atomized verdict generators, but as parts of a larger system of democratic feedback; not just as administrative units, but as sites of minority rule. We might even think of juries as something akin to state legislatures,[97] with "the law" emerging from the collective decisions of juries in roughly the same way that "the price" emerges from the collective decisions of market participants.[98] These ideas, of course, would go some way toward returning the jury to its historical roots.[99]

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local institutions in one key respect, however. Decisions to acquit are shielded from reversal ex post.

[94] For exceptions to this rule, see, for example, Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995); Paul Butler, Essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005); and Jenny E. Carroll, *Of Rebels, Rogues and Roustabouts: The Jury's Second Coming* (Seton Hall Pub. Law Research Paper No. 1486188, 2010), *available at* http://ssrn.com/abstract=1486188. *Cf.* Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29 (1994).

[95] See sources cited *infra* note 96.

[96] Many initiatives in recent years have sought to eliminate this bug. *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 129–31 (1994); Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 709 & n.3 (1993) (collecting examples).

[97] *See* AKHIL REED AMAR, THE BILL OF RIGHTS 94–96 (1998) (noting ties between juries and legislatures in the eyes of the Founders).

[98] *See, e.g.*, Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1612, 1629–30 (2004) (describing private settlement market for tort claims emerging from aggregate data on jury awards).

[99] *See* AMAR, *supra* note 97, at 92–94; THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800, at

If we imagined juries as sites of minority rule interacting with a broader polity, we might think differently about the fact that they vary in their composition.[100] Just as variation in state legislatures gives us a more textured account of what "the People" think, so too with juries.

We might even predict that judicial practice would change. Consider, for instance, what the Supreme Court does when it evaluates whether a practice is "cruel and unusual." It engages in "nose counting,"[101] toting up the decisions of state legislatures to see where the People stand.

We could do the same with juries.[102] Juries' decisions would give us a more fine-grained read on where the People stand. Legislatures make law at some distance from individual cases. When jurors decide, they do so in a context where neither the defendant nor the victim is a cipher. And they come to those decisions through an entirely different process, one involving face-to-face interactions unmediated by political parties or electoral politics.[103] Verdicts can thus offer a perspective on the People's view that is usefully different from the legislative one.

Take another widely accepted practice regarding juries: we exclude people who are unable or unwilling to impose the death penalty.[104] It is a perfectly sensible rule if we think juries should simply apply "the law" consistently across cases. But if we imagine juries as democratic decisionmakers, as part of the lawmaking process, even as sites of resistance, then the practice looks quite odd. Excluding jurors based on their opposition to the death penalty would be a bit like excluding state legislators for holding an outlier view.

A reader at this point is likely to have in hand a very long list of reasons why variation in jury composition is a serious problem. Of course. I have a longish list of my own.[105] There is no denying that these arguments run up against a deeply ingrained sense that juries

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153–264 (1985). *But see* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 318–31 (2003).

100 For an effort to provide such an account, see Gerken, *supra* note 94.

101 *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 564–65 (2005). For two different takes on this practice, compare Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005), with Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17 (2009).

102 We could also do the same with locally elected prosecutors. Take the death penalty. Most state legislatures have endorsed the death penalty. Many local prosecutors and juries have moved away from it. *Death Row Cases Decline in 2009* (NPR radio broadcast Jan. 4, 2010), *available at* http://www.npr.org/templates/story/story.php?storyId=122102218. As a result, despite little change in state legislative support for the practice, the number of death sentences has declined dramatically. *Id.* You might think that fact ought to matter. After all, locally elected prosecutors experience the concrete, ongoing costs of death penalty litigation, and they often decide the game is not worth the candle.

103 *Cf.* Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003).

104 *See* Wainwright v. Witt, 469 U.S. 412 (1985).

105 *See* Gerken, *supra* note 94.

should apply law, not make it, and that justice requires consistency across cases. As I said before,[106] nothing in this Foreword is meant to deny the legitimacy of that view or to suggest it wouldn't outweigh the benefits I outline here. But we know those arguments, and we don't have a full account of their competitors. The point of this exercise is simply to show that an account of federalism-all-the-way-down at least complicates what might otherwise seem like the *easiest* of propositions — that every jury should mirror the population from which it is drawn. If we can complicate our account of the jury, surely we can make the case for federalism-all-the-way-down in the many areas where a domain-centered account wouldn't push as hard against federalism's insights.

III. THE POWER OF THE SOVEREIGN VERSUS THE POWER OF THE SERVANT: SEPARATION OF POWERS, CHECKS AND BALANCES, AND FEDERALISM

Just as orienting federalism around institutions where sovereignty is not to be had would expand our vision of the governance sites that make up "Our Federalism," so too, would it widen the lens when we think about how the center and its variegated periphery interact. Federalism has long been thought to play an important role in checking an overweening national government. Unsurprisingly, many assume that minorities need sovereignty — a shield against federal interference — for minority rule to represent a useful check. As a result, they have neglected the uncooperative dimensions of "cooperative federalism."[107]

Here I argue that the power of the servant can rival the power of the sovereign. Just as we think of horizontal checks in a dichotomous fashion — deploying two competing accounts of how one institution checks another — so too we should think of the vertical checks as involving two quite different conceptions of power. Developing something akin to a checks-and-balances account for federalism would help enrich our vision of minority rule not just for states and cities, but also for the sublocal and substate institutions discussed in Part II.

A. Federalism and the Separation of Powers

Federalism and the separation of powers have long been considered complementary strategies for diffusing national power — one vertical, one horizontal.[108] But there is a curious difference between the two.

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[106] *See supra* pp. 10–11.

[107] For an effort to remedy this neglect, see Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009), on which I draw throughout this section.

[108] For quite different efforts to examine the connections between these two theories of institutional design, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1504–19

At least since Madison, we have had two competing accounts of how to check a government horizontally. The first, separation of powers, depends on autonomy and independence. Power is diffused by ensuring that institutional actors swim in their own lanes, carrying out their own programs within their own independent spheres. The second model, checks and balances, depends not on separation and independence, but on integration and interdependence. Power is diffused by creating a messy structure of overlapping institutions that depend on one another to get anything done. Both accounts are well theorized in the academic literature and routinely deployed by the Supreme Court.[109]

Only one model for diffusing power dominates the debate on vertical checks: sovereignty. It has long served as the touchstone for ensuring that "[a]mbition . . . be made to counteract ambition."[110] Sovereignty is the natural cognate to the separation of powers. It, too, hinges on the notion that power diffusion depends on independence rather than interdependence. It, too, turns on formal accounts of separate policymaking spheres. It, too, envisions power as the ability to control policy within one's own empire.

Absent from federalism theory is a competing strategy for diffusing power, the cognate to the checks and balances approach. We don't even have a name for this idea, let alone a fully theorized account. This omission is particularly strange because the powers of the states and federal government are often functionally, if not formally, as integrated as the powers of the three branches. And yet we continue to emphasize the hierarchical dimensions of federalism rather than imagining federal-state relations as we do the relations between the three branches — as a system that mixes conflict and cooperation to produce governance.

One might object that process federalism is the natural cognate to checks and balances because its proponents look to politics and interdependence as leverage points for protecting states from an overweening federal government.[111] But, as noted above, process federalism le-

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(1987); Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075 (1997); Clark, *Separation of Powers*, *supra* note 26; Hills, *supra* note 49.

109 These arguments trace back at least to the competing positions articulated by Montesquieu and Madison. *Compare* THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 2003), *with* MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748). For an overview of the contemporary debate over separation of powers, see M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000).

110 THE FEDERALIST NO. 51 (James Madison), *supra* note 109, at 319.

111 Some process federalists believe that these "political safeguards" are sufficient to protect state power. *E.g.*, Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1557 (1977). Others imagine the courts playing an Elyian role by ensuring the political safeguards work properly. *E.g.*, Young, *supra* note 22, at

verages state-federal integration to help states maintain their own loosely defined policymaking domains or regulatory carve-outs. It fits best where there's a there there — where states' de facto autonomy mirrors the de jure autonomy conferred by sovereignty. That's because arguments about de facto autonomy are much like arguments about sovereignty: they tend to focus on who gets to play the trump card when the center and periphery tussle.[112] Both thus fit with the separation of powers approach, where the trick is to figure out who possesses which power, and the game ends when the trump card is played.[113]

B. The Power of the Servant

We need a competing theory to analyze the parts of "Our Federalism" where co-governance[114] is the norm, an account of the power of the servant to play against existing accounts of the power of the sovereign. We need a vertical cognate to the checks and balances model.[115]

Such an account would offer a natural fit for the administrative structures that make up federalism-all-the-way-down. Just as checks and balances are thought to provide the best account of the Fourth Branch's constitutional status,[116] the power of the servant is all but built for the oft-neglected administrative dimensions of federalism-all-the-way-down.[117] Indeed, one would think that the power of the servant would be *the* dominant model for theorizing about localism given

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1395 ("We need a *Democracy and Distrust* for federalism doctrine — that is, a doctrine of judicial review constructed to protect the *self*-enforcing nature of the federalist system.").

112 *Cf.* Ahdieh, *supra* note 46, at 868 ("Ongoing debates over federalism . . . seem trapped in unnecessarily binary conceptions of the vertical allocation of power."); Richman, *supra* note 47, at 379 (challenging accounts of federalism in the criminal context that "treat[] state and local governments as objects of federal initiatives, not as independent agents").

113 An exception is the work Rick Hills has done on the Court's anticommandeering cases, where he argues in favor of leveraging sovereignty not to protect states' independent domains, but to make sure the iterated regulatory game between the states and federal government is played sensibly. Hills, *supra* note 20. For work in a similar vein, pitched at a higher level of generality, see Gillette, *supra* note 59.

114 Thanks to Mary Combs for suggesting the phrase. For a use of that phrase in the context of federalism, see Peter M. Ward & Victoria E. Rodríguez, *New Federalism, Intra-governmental Relations and Co-governance in Mexico*, 31 J. LATIN AM. STUD. 673 (1999). For a use of a similar phrase, see Ahdieh, *supra* note 46, at 870, which describes cross-jurisdictional regulatory arrangements as "co-regulation."

115 The analogy is rough, of course, as there are real differences between these two relationships. Checks and balances at the horizontal level, for instance, pivot off the fact that the branches are semi-autonomous and perform some different functions, whereas, for the most part, the federal government can perform the same basic functions the states can.

116 Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

117 Peter Strauss suggests a similar connection in passing. *See id.* at 620.

localism's mantra that cities are entirely the creatures of the state.[118] Administrative agents are located inside the system, not outside of it. Administrative power is not defined as presiding over one's own empire. If power formally belongs to anyone, it belongs to the principal, which can expand or contract the agency's sphere of authority. The power of the administrative agent, in short, is not the power of the sovereign, but the power of the servant.[119]

Like the checks and balances model, an account of the power of the servant is well suited for policymaking domains where institutions regulate together, power relations are contingent and fluid, and classifying which portion of the administrative structure belongs to whom is likely to be as frustrating as it is futile.[120] Both treat debates over jurisdictional lines as if they are beside the point.[121] More importantly, the inquiry for both accounts rarely ends — as it typically does for both the separation of powers and sovereignty[122] — with the conclusion that one institution gets to trump the other.[123] Co-governance is instead the model — an ongoing, iterated game which may continue even after a trump card is played — and what matters is how the two

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[118] *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907); 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911). For an overview of debates within local government law on this issue, see sources cited *supra* notes 82 & 87.

[119] One might argue that an administrative structure is, by definition, not a federal one. *Cf.* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 944 (1994) (arguing states cannot serve federalism's ends in the United States because they function as "mere administrative units" of the federal government). But, as Vicki Jackson points out, if one thinks the key to federalism is not sovereignty or lawmaking autonomy, then "[a] federal system might simply provide for the existence of two levels of government, with independently elected leaderships, in which the national-level government had plenary legislative jurisdiction and the subnational level had principal administrative responsibilities." Jackson, *supra* note 9, at 2219.

[120] *Cf.* Strauss, *supra* note 116, at 603 ("The imprecision inherent in the definition and separation of the three governmental powers contributes to the tensions among them . . . ."). Though Alex Aleinikoff and Robert Cover begin with a quite different example — federal-state interactions in the habeas context — they propose a markedly similar vision of federalism, one "premised upon conflict and indeterminacy" where "neither system can claim total sovereignty." *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048 (1977).

[121] *See* Strauss, *supra* note 116, at 620–21 (arguing that the checks and balances approach "make[s] largely irrelevant to constitutional analysis where a given government function — or the bureaucracy as a whole — is placed on the governmental organizational chart").

[122] *Cf.* SCHAPIRO, *supra* note 17, at 94 ("Dualist federalism is a zero sum game, a battle over territory that demands a victor.").

[123] *See* Strauss, *supra* note 116, at 604 (arguing that the checks and balances approach reflects "a process not an institution, with impermanence of resolution not only inevitable but desirable as an outcome"); *cf.* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1736 (1996) (arguing that the checks and balances approach focuses simply on "maintaining a basic equilibrium among the branches" rather than on allocating particular powers to particular branches).

institutions partner with one another.[124] The key is not to figure out who wins, but to understand how the center and periphery interact and to maintain the conditions in which they can productively cooperate, conflict, and compete.[125]

The vertical cognate to checks and balances is also well suited for theorizing about the uncooperative dimensions to cooperative federalism. In thinking about horizontal checks, we laud checks and balances for generating friction — maintaining a healthy tension between branches through repeat interactions.[126] So too, the iterated exchanges between agent and principal within federalism-all-the-way-down allow for a form of dynamic contestation.[127]

C. The Source of the Servant's Power

One might fairly ask whether it's a mistake to use the phrase "minority rule" in the context of federalism-all-the-way-down. Can minorities rule where they lack a policymaking domain of their own and their decisions can be reversed or bypassed if the center is willing to spend the political capital to do so?

Here and in Part IV, I argue that the servant can be quite powerful even though the power it wields is unlike that of the sovereign. Administrators often have a great deal of discretion in carrying out their duties, but that discretion can be expanded or contracted at the behest of the principal. The policymaking space where they wield power is not a separate policymaking domain or even a regulatory carve-out, but the nooks and crannies of the administrative system. The servant, in short, wields power akin to that of a street-level bureaucrat[128] — power that is not his own, but that can nonetheless be substantial.[129]

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124 *Cf.* Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 812 (2008) ("The key problem for federalism is not separating state from federal power, but managing the overlap of state and federal law.").

125 *Cf.* Strauss, *supra* note 116, at 578 (describing the purpose of the checks and balances approach).

126 *Cf. id.* (arguing that checks and balances establishes "multiple heads of authority in government, which are then pitted against one another in a continuous struggle").

127 *See* Bulman-Pozen & Gerken, *supra* note 107, at 1266–68.

128 *See generally* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980).

129 The claim that administrators enjoy discretion might make one think that my argument is no different from that of the process federalists, who emphasize states' de facto autonomy. As Jessica Bulman-Pozen and I have written elsewhere, however:

> It would be a mistake . . . to equate the autonomy of the sovereign with the autonomy of the servant. Of course, discretion and leverage give the servant "autonomy" in a thin sense because servants enjoy de facto power to make some decisions on their own even though they formally report to a higher authority. But this autonomy is quite different from that typically contemplated by federalism scholars. The servant's power to decide is interstitial and contingent on the national government's choice not to eliminate it.

1. Interdependence. — The power of the servant — like the checks and balances model — turns not on independence, but on dependence.[130] The system works not because every governmental actor hews to its own policymaking realm, but because institutions are messily and sometimes haphazardly integrated and thus depend on one another to get anything done.[131] School committees wield power not because they preside over their own empires, but because state legislatures depend on them to help run the education system. States and local officials administering federal law can edit the law they lack the power to authorize[132] precisely because they are inside the system, not outside of it.

The fact that the agent and principal are interdependent does not, of course, mean that they always cooperate. That is the insight of the checks and balances approach, and it holds true of principal-agent relations as well. Just as the relationship between the street-level bureaucrat and his manager is one of "mutual dependence" and is "intrinsically conflictual,"[133] so too are the relationships within federalism-all-the-way-down marked by both collaboration and conflict.

As with the checks and balances model, power is diffused because the acquiescence of different majorities is necessary to act. As Frank Michelman explains, under a checks and balances model, "no simple majority of any single body of deciders can do anything without the concurrence of a majority of some other body of deciders."[134] So too with its vertical counterpart.[135] A majority of the state legislature is

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> The servant thus enjoys microspheres of autonomy, embedded within a federal system and subject to expansion or contraction by a dominant master.

Bulman-Pozen & Gerken, *supra* note 107, at 1268. Consider, for instance, the discretion exercised even in highly routinized federal regimes like Social Security or OSHA. *See, e.g.*, Mashaw, *supra* note 77, at 142–44; Scholz et al., *supra* note 77. Few would conflate this sort of discretion with the de facto autonomy lauded by federalism scholars. Yet it's clear that state administrators wield power of a sort.

130 This argument draws heavily upon the work of Larry Kramer, one of the first to orient constitutional theory around the administrative dimensions of "Our Federalism." *See* Kramer, *supra* note 9, at 283–85; Kramer, *supra* note 8, at 1542–46. The key difference between my account and Kramer's is that he focuses on the ways in which states can leverage federal dependence to maintain autonomous policymaking realms, whereas I focus on the power the servant exercises within an integrated policymaking regime.

131 This results in "approximate equality of power, or at least mutual ability to frustrate." Cover & Aleinikoff, *supra* note 120, at 1053.

132 I borrow this phrase from Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 164 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999), though he refers only to the ability of electoral minorities to challenge the law in an acceptably neutral process. *Id.* at 183–84.

133 LIPSKY, *supra* note 128, at 25.

134 Frank I. Michelman, *"Protecting the People from Themselves," or How Direct Can Democracy Be?*, 45 UCLA L. REV. 1717, 1724 (1998) (citing Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1528 (1990)).

135 *See* Young, *supra* note 36, at 1289–90.

necessary for a federal program to move forward. A majority of a school board is necessary for a state law to be implemented.

The key difference between the two models is what kind of majorities are needed to act. Under a checks and balances approach, one principal checks another. Representation is thus "problematized"[136] as one body that represents the nation checks another that represents it differently. Each is prevented from claiming to be a true stand-in for the People by the very presence of the other.[137]

The vertical counterpart to checks and balances might problematize the problematics of representation still more by allowing agents to check the principal. National and state minorities check national and state majorities, thus raising evocative questions about how the People are represented.[138] With federalism-all-the-way-down, they are represented not by the Senate or the President, but by a disaggregated and variegated set of decisionmaking bodies rendering different, sometimes conflicting, decisions. The stand-ins for the People, then, are institutional theys, not institutional its. This odd arrangement might push toward a quite different vision of representation, one in which the People are represented by the decisions they make and the institutions they build, not by the politicians they elect.

2. Integration. — As with checks and balances, the source of the servant's power is not separation, but integration. The servant possesses power to push back, even resist, because he is inside the system, not outside of it. As insiders to the system, servants exercise a muscular form of "voice," as they can set policy rather than merely complain about it.

State and local officials can also take advantage of the web of connective tissues that bind the periphery to the center. Regular interactions generate trust and give lower-level decisionmakers the knowledge and connections they need to work the system. Consider it the institutional version of the contact hypothesis.

Insider status may even give state and local servants standing, in the colloquial sense, to resist the center. These officials can serve as what we might loosely term "connected critics," to borrow Michael Walzer's term.[139] On Walzer's view, outsiders are rarely successful when they criticize a community. Instead, an effective dissent-

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136 *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 184–85 (1991).

137 *See id.*; *see also* Bryan Garsten, The Heart of a Heartless World: Liberal Religion and Modern Liberty 73–80 (Feb. 2010) (unpublished manuscript) (on file with the Harvard Law School Library).

138 These issues can be traced back to the *Federalist Papers*. *See, e.g.*, THE FEDERALIST NOS. 39, 46 (James Madison), *supra* note 109.

139 *See generally* MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM 61 (1987).

er must be "a little to the side, but not outside" of the community he challenges.[140]

3. Serving Two Masters. — One might think that federalism scholars have neglected the uncooperative elements of cooperative federalism because bureaucratic institutions are unlikely to be sites of resistance. Perhaps this observation carries weight in fully centralized, fully professionalized systems (though a robust literature on the principal-agent problem obviously raises substantial doubts[141]). But it misses the mark where, as here, state and local officials are drawn from — and often partially beholden to — different constituencies, and the administrative structures feature populist as well as technocratic elements.

Put more succinctly, the power of the servant comes from serving two masters, not one. Just as Congress, the Court, and the President draw their power from different sources, so too with state and local servants. A state environmental agency may be dominated by policymakers who don't subscribe to a federal norm. A jury can nullify a law that is not to its liking. School boards will find ways to introduce a bit of religion into the classroom. Locally elected sheriffs or prosecutors may neglect marijuana cases. State social security administrators may decide cases in a more generous fashion than federal officials desire.

One might well resist the idea of introducing dissent and resistance into an administrative structure. But if one accepts one of federalism theory's basic premises — that it is useful to cultivate a healthy tension between the states and the federal government — then one might want to introduce a similar dynamic within the behemoth we call the federal administrative state. Indeed, at a time when many argue that we need more dissent and debate within federal agencies,[142] one might well value these "federalist safeguards of administration."[143]

The type of interactions that occur in the institutional arrangements that make up federalism-all-the-way-down will depend largely on the bureaucratic forms involved. Sometimes these dynamics play out among technocratic insiders (or, at least, among bureaucrats who marry politics with expertise). Sometimes the state agents implement-

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[140] *Id.*

[141] As does the work done on the multiple and conflicting sites of power within the three branches and federal agencies in general. *See* M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001); *see also* M. Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. (forthcoming 2011) (on file with the Harvard Law School Library). In Liz Magill's words, "[i]f diffused government authority is what we are after, we have it, in spades." Magill, *supra*, at 651.

[142] *See, e.g.*, Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

[143] Bulman-Pozen & Gerken, *supra* note 107, at 1286.

ing federal policy are at the other end of the spectrum — pure political agents, like governors or state legislators. These actors, unsurprisingly, often try to leverage their nominally bureaucratic power in the service of explicitly political goals. Consider, for instance, the efforts of Republican Governors Tommy Thompson and John Engler to use federal money and authority granted under federal law to create a new "welfare-to-work" model that would eventually help topple the scheme put in place by the Democrats.[144] Sometimes the state's technocratic and political voice may originate from the same source. For example, institutions like state school boards display both technocratic and political features. School board members are often elected and thus susceptible to direct political influence. But they also hold themselves out as "educational experts." In still other instances — juries, locally rooted school committees, or zoning commissions — we see institutions with genuine participatory roots serving an administrative role. In sum, the varied sites of state and local governance can introduce varied forms of dissent into the Fourth Branch.

Examples. — Let me ground this with some examples to show how an account of the servant can reframe ongoing debates about state and local power. First, consider the seemingly endless debate on how to strike the balance of power between the states and the federal government. Those who worry about state power almost invariably propose a sovereignty-like solution: enlarging the policymaking empires over which the states preside.[145] And while those on the other side often try to "fight federalism with federalism"[146] — invoking the interests of the state when challenging a sovereignty-like solution — they don't even have a vocabulary to make the case, let alone a set of familiar arguments to rehearse.

Think about the efforts of the dissenters in *Printz v. United States*[147] and *New York v. United States*[148] to resist the majority's anticommandeering arguments. The majority was able to invoke deeply intuitive, historically rooted arguments about the value of sovereignty. While the dissenters were feeling their way around some of the arguments I sketch above,[149] they had to make the argument piecemeal. Imagine if instead the dissenters had been able to draw upon a well-

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144 *See id.* at 1274–76.

145 One exception is Kramer, *supra* note 9, at 291.

146 Barron, *supra* note 26.

147 521 U.S. 898 (1997).

148 505 U.S. 144 (1992).

149 *See* Barron, *supra* note 26, at 2117 (arguing that the dissenters' position stems "less from a generally nationalist orientation than from an embrace of complexity, interdependence, and a skepticism about formalist claims").

established doctrinal analogue like "checks and balances" in making their case.

Or consider debates about local power, which look much like debates about state power, with some modest variation. Some localists make the same move that the federalists do, urging more policymaking autonomy for cities.[150] Others argue that cities should be allowed to form regional governments to deal with shared problems.[151] While a regional government divests cities of some powers, it wins them other, more important ones and thus remains a sovereignty-perfecting move.

An account of the power of the servant might push in a different direction, leading some to demand greater federal-state or state-local integration as a tool of local empowerment. Richard Schragger, for instance, is one of the rare scholars to make this move, though he is ultimately agnostic about its prescriptive implications.[152] He observes that French mayors, who operate in a fully centralized system, seem to wield more power than U.S. mayors, precisely because they are policymaking insiders.[153] Their American counterparts, in sharp contrast, "tend not to have ongoing relationships with federal elected officials or federal bureaucracies. Instead of being direct participants in state and federal policymaking, they are outsiders to it, only as influential as any other representative of a group or institution seeking government aid might be."[154]

Or consider a narrower example where an account of the power of the servant might prove useful: the debate between Richard Schragger and David Barron over the wisdom of San Francisco's decision to issue marriage licenses to same-sex couples.[155] One argument pivots on the power of the sovereign, the other on the power of the servant.[156]

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[150] *See supra* p. 26.

[151] For an overview of the development of these ideas, see Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 100–19 (2003). For a thoughtful effort to explain why we see so little interlocal cooperation and to find ways to encourage more of it, see Clayton P. Gillette, *The Conditions of Interlocal Cooperation*, 21 J.L. & POL. 365 (2005).

[152] *See* Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2563 (2006). *But see* Hills, *Is Federalism Good for Localism?*, *supra* note 59. David Barron argues that "a single-minded desire to protect local autonomy by limiting central power actually may do little to promote the values normally associated with local autonomy," Barron, *supra* note 86, at 379, though his solution focuses on giving localities the right kinds of power (for example, the power to deal with the problems they face) and protections (for example, protecting localities from externalities imposed by others). *Id.* at 382–90.

[153] Schragger, *supra* note 152, at 2561.

[154] *Id.* at 2562–63.

[155] *Compare id.* at 2573–75, *with* Barron, *supra* note 84.

[156] See Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633 (2006), from which I draw the next three paragraphs. In the interest of full disclosure, I should note that I supervise

Schragger sees the city's action as an assertion of urban power, a claim that the city had a role in interpreting the federal Constitution. Barron rejects this notion because the city invoked the federal Constitution to justify its actions. In Barron's view, by claiming that it was bound by higher law, the city was asking the court to take away its ability to decide for itself what marriage is, thus cutting back on its policymaking domain. How do we reconcile these claims?

If urban power stems solely from policymaking autonomy, the ability to preside over one's own empire, then Barron has it right. San Francisco was acting as a mere "functionary of the state," just as he claims.[157] But if we focus on the power of the servant, we might, along with Schragger, think that San Francisco was asserting urban power of a different sort. By emphasizing its fealty to federal law rather than demanding protection from federal interference, the city was deploying a trope commonly used by dissenters to buttress their claims. It was declaring itself to be a full member of the national community, reminding us that the city possessed standing (in the colloquial sense) to take part in the national debate about gay marriage. The city was not insisting on its right to make the decision; it was insisting on its right to be part of the decisionmaking process.

Conversely, an insistence on sovereignty and separateness — the form of urban power that Barron invokes — might have undermined the city's standing to speak on national issues. The city would have been demanding an exception from the national rule rather than insisting that the rule be changed.[158] Had the city looked like it was engaged in special pleading rather than pleading for a new morality, it would have taken some of the wind out of its sails as it made the case for same-sex marriage.

In sum, just as the separation of powers and checks and balances represent competing means of understanding the horizontal distribution of power, so too we should have two models for understanding the vertical distribution of power. As with the horizontal distribution of power, federalism features "separateness but interdependence, autonomy but reciprocity."[159] And just as formal separation and functional integration work in tandem to diffuse power horizontally,[160] so too state autonomy and federal-state integration work in tandem to diffuse

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a program that has allowed Yale law students to work on pending litigation in favor of same-sex marriage on behalf of the City.

157 Barron, *supra* note 84, at 2236.

158 *But see* MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 12 (1970) (arguing that "the historical basis of liberalism is in large part simply a series of . . . recognitions" of "the claims of smaller groups" for exemptions from general rules).

159 Mistretta v. United States, 488 U.S. 361, 381 (1989) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)) (internal quotation mark omitted).

160 Strauss, *supra* note 116.

power vertically. Voice and exit serve as competing and complementary channels for dissent and resistance. For all of these reasons, developing an account of the power of the servant would help us understand the uncooperative dimensions of cooperative federalism.

IV. TOWARD A NATIONALIST ACCOUNT OF FEDERALISM-ALL-THE-WAY-DOWN, OR: WHY NATIONALISTS SHOULD STOP WORRYING AND LEARN TO LOVE FEDERALISM

While federalism's champions have long argued that it serves national interests, nationalists remain skeptical. Some think federalism no longer matches twenty-first-century realities — a muscular national government paired with a nation-centered democratic culture.[161] On this view, federalism fails as a descriptive matter because states lack sovereignty, a distinctive political identity, or both. Others believe that states represent distinctive political communities, and that's precisely why they should be denied sovereignty. Pointing to federalism's ugly role in preserving slavery and Jim Crow, these critics insist that states should not be allowed to depart from strongly held national norms.[162] On the nationalist account, then, federalism is either an illusion or a mistake.

If we orient federalism around institutions that lack sovereignty, we can build a nationalist account of "Our Federalism," one that converts federalism's signature vices into plausible virtues. As I argue in section A, such an account would depict federalism-all-the-way down as minority rule *without* sovereignty, a middle ground between the two conventional poles of democratic design (conventional federalism, on the one hand, and diversity, on the other). Section B argues that minority rule that takes this form can promote the values long associated with the Fourteenth Amendment. Section C makes a similar point about the First Amendment. This Part concludes by arguing that nationalists, who have long ribbed federalists for being too attached to sovereignty, need to move beyond sovereignty as well.

A. Federalism-All-the-Way-Down as a Democratic Third Way

As noted above, what distinguishes constitutional federalism from its competitors is that it provides a normatively inflected, broad-gauged account of why federalism is good for democracy. Federalism scholars don't just dwell on the technocratic or policymaking benefits of decentralization; they also emphasize the role it plays in shaping identity, promoting democratic debate, and diffusing power.

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161 *See* SCHAPIRO, *supra* note 17, at 21–24, 31–53.

162 *See infra* pp. 46–47, 49.

We can build a similar account for the institutional arrangements that make up federalism-all-the-way-down.[163] Federalism-all-the-way-down is an intriguing strategy for resolving one of the great puzzles of democratic design: how to treat minorities in a majoritarian system.

1. The Conventional Poles of Democratic Design. — In the American context, solutions to this puzzle tend to rotate around two conventional poles. The first is to integrate minorities into a centralized system, ensuring them a voice on every decisionmaking body. We use the term "diversity" for this approach. Diversity means that governing bodies should mirror the populations from which they are drawn — they should "look like America," to use Bill Clinton's favorite phrase.[164] As I detail in the next two sections, this vision runs so deep within our intellectual traditions that it is inscribed in our vocabulary.

As a practical matter, diversity gives minorities a voice — but not a controlling vote — in every decision. It thus submerges their votes on any issue over which members of the minority and majority divide. Minorities are present everywhere, but they never rule.

Federalism, at least as it is conventionally understood, is diversity's chief competitor. It values "second-order diversity"[165] (variation between decisionmaking bodies) rather than first-order diversity (variation within decisionmaking bodies). It thus gives minorities an opportunity to rule in some part of the system.

Federalism's account of minority rule has long been paired with sovereignty. As many have argued, sovereignty is unnecessary to achieve many of the ends attributed to federalism. After all, a centralized decisionmaker might think it's quite a good idea to encourage participation, competition, and tailoring at the local level.[166] But if we imagine states as robust sites of minority rule — places where minorities can enact policies that fly in the face of national norms, even resist federal power — most of us assume that minorities require a shield against the national supremacy trump card. Put differently, federalism's account of minority rule has long privileged exit and autonomy over voice and integration.

2. Minority Rule Without Sovereignty: A Middle Ground. — If we were to shake the notion that minority rule must be paired with sovereignty, we would notice that much of "Our Federalism" represents an

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[163] Here I focus primarily on the participatory and political dimensions of federalism-all-the-way-down, although I think a weaker case can be made even in sites typically understood to be fora non conveniens for democratic engagement, like professional bureaucracies. *See* Bulman-Pozen & Gerken, *supra* note 107.

[164] *See, e.g.*, Dan Balz & Ruth Marcus, *Clinton Said to Fill Last 4 Cabinet Jobs: Baird, Babbitt, Espy, Peña Chosen*, WASH. POST, Dec. 24, 1992, at A1.

[165] Gerken, *supra* note 94.

[166] *See, e.g.*, FEELEY & RUBIN, *supra* note 9, at 20–29; Cross, *supra* note 12, at 20–27.

intriguing middle ground between the conventional poles in this debate. Federalism-all-the-way-down features minority rule *without* sovereignty. It is thus a democratic third way, one that fuses the opportunities for minority rule offered by federalism with the political integration offered by diversity. In these parts of "Our Federalism," minority rule takes place in the nooks and crannies of an administrative structure. Minority groups' decisions are thus contingent, limited, and subject to reversal by the center. Moreover, minorities make policy not separate and apart from the center, but as part of an integrated regime.

Like the diversity model, this account of federalism is one that emphasizes voice over exit. But the opportunities for "voice" that federalism-all-the-way-down supplies are of a more muscular variant than proponents of the diversity paradigm typically imagine. Within these institutional arrangements, the insider's "voice" isn't confined to speech. It includes the power to act — the ability to tweak, adjust, even resist federal policy by virtue of the role minorities play in administering that policy.

These unusual features supply grounds for building a nationalist account for federalism. Here I focus on the two areas where federalism has long been thought to be most vulnerable to attack by nationalists. If we can show that federalism's signature vices can be recast as plausible virtues, the odds are that there are other areas where the cost-benefit analysis is more complicated than we typically assume.

The nationalists' objection to conventional federalism typically takes one of two forms. The first is a worry that local power is a threat to minority rights.[167] The second is a related concern about what we might loosely analogize to the principal-agent problem — the fear that state decisions that fly in the face of deeply held national norms will be insulated from reversal.[168] Both find their strongest examples in the tragic history of slavery and Jim Crow. Both are rooted in a sovereignty account of federalism.

While skepticism about federalism's past is eminently sensible,[169] we should be open to the possibility that at this stage in our history, minority rule — and not just minority rights — represents a tool for

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167 Consider William Riker's aphorism that if "one disapproves of racism, one should disapprove of federalism." RIKER, *supra* note 12, at 155; *see also* FEELEY & RUBIN, *supra* note 9, at 53; SHAPIRO, *supra* note 2, at 45–47, 50–56; Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 501 (1995); Choper, *supra* note 111, at 1571, 1618–19; Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1306–07 (1999). Akhil Amar is an exception. He argues that "the Constitution's political structure of federalism and sovereignty is designed to protect, not defeat, its legal substance of individual rights." Amar, *supra* note 108, at 1426.

168 *See, e.g.*, FEELEY & RUBIN, *supra* note 9, at 16.

169 Some argue that this is not even a fair account of federalism's past. *E.g.*, Baker & Young, *supra* note 2, at 144–47.

combating discrimination and promoting democracy. The next two sections show that if we shed the assumption that minority rule must be accompanied by sovereignty, we could look to local institutions as sites for minority rule. Those institutions are small enough to benefit two groups that are generally too small to control at the state level: racial minorities and dissenters, both objects of constitutional solicitude. Federalism reimagined thus reveals that the benefits of minority control can extend not just to Southern racists, but to blacks and Latinos; not just to powerful regional dissenters, but to weak local outliers. In each instance, federalism-all-the-way-down represents an institutional design strategy for furthering the goals that we traditionally associate with the First and Fourteenth Amendments — the very amendments that played such a crucial role in ending Jim Crow. It can thus reveal largely unexplored, largely unappreciated connections between the two grand traditions of constitutional law: structure and rights.[170]

Turning to the nationalists' second worry — the principal-agent problem — I argue that minority rule without sovereignty offers a more attractive model of federalism because it allows the national majority to reverse a decision if it is willing to spend the political capital to do so. Freed from the heavy costs associated with sovereignty, we might even think that the principal-agent problem isn't always a problem. While local resistance surely has its costs, minority rule at the local level generates a dynamic form of contestation, the democratic churn necessary for an ossified national system to change.

The arguments offered in the next two sections are nationalist in two senses. First, they turn one of the main arguments for national power on its head. In the wake of Reconstruction and Jim Crow, we have long thought that those interested in liberty and equality should look to the national government. The account below suggests, however, that localism can serve the same constitutional values as the First and Fourteenth Amendments.

Second, the account I offer here emphasizes the centripetal dimensions of "Our Federalism."[171] Some nationalists worry that federalism

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[170] It would thus return us to the Framers' original vision of structure, rather than rights, being the key to promoting individual liberty. AMAR, *supra* note 97; THE FEDERALIST NOS. 47, 51 (James Madison), *supra* note 109.

[171] Such an account bears a family resemblance to accounts of federalism that cast states as laboratories of democracy that inform national policymaking, *see* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 430–31 (1998); Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 WM. & MARY L. REV. 1385, 1391 (2005), as well as to Mark Tushnet's depiction of federalism as "a way station from a society in which people have widely divergent values into one in which they have convergent ones," Mark Tushnet, *Federalism as a Cure for Democracy's Discontent?*, *in* DEBATING DEMOCRACY'S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY 307, 310 (Anita L. Allen & Milton C. Regan, Jr., eds., 1998). At some level of generality, my account also

needlessly fractures the nation, exercising a centrifugal force on the polity. My account depicts a system in which local power exercises a gravitational pull on outsiders, integrating them into the political system. It envisions a system in which the decisions produced by minority rule do not stand separate and apart from the system, but feed back into national debates. It is one in which the energy of outliers serves as a catalyst for the center.

B. Federalism and Race

One of federalism's oddities is that it's a theory that largely depends on minority rule, yet we rarely have a clear idea about which minorities rule and why we should care. For most theories of federalism to have any bite, different majorities must control at the state and national level.[172] But surprisingly little is written about the precise source of variation. Some rely on the promise of Tieboutian sorting to ensure policy diversity.[173] Others assert that states possess distinctive identities that shape their politics and policies.[174]

Interestingly, it is the nationalists who are the most explicit about identifying who benefits from federalism. They regularly point out that devolution has played a tragic role in shielding a powerful regional dissenter — Southern racists — in its efforts to oppress blacks, a minority within the minority.[175] Federalism has often been a codeword for letting racists be racists.

Save for an apologetic sidebar on federalism's past, federalism scholars have had remarkably little to say in response. Indeed, one almost suspects that the South's sad history is the real reason that federalism's supporters prefer not to delve into the details. As a result, relations between federalism and equal protection have long been strained. Those genuinely interested in federalism simply stipulate its

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limns themes long associated with pluralism and integration that I could not possibly canvas here. For a sampling of these arguments as they relate to race, see, for example, W.E.B. DUBOIS, DUSK OF DAWN: AN ESSAY TOWARD AN AUTOBIOGRAPHY OF A RACE CONCEPT 197–200 (1940) which argues for temporary segregation of blacks as a means of achieving integration in the long term; Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) which argues that all-black schools can serve the cause of integration in some circumstances; and Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 281–98 (2005) which traces the historical ties between racial uplift theories and desegregation efforts for lawyering by African Americans between World War I and World War II.

172 *See supra* note 10.

173 *E.g.*, McConnell, *supra* note 2, at 1498–99.

174 *See* sources cited *supra* note 29.

175 *See, e.g.*, Choper, *supra* note 111, at 1572.

inapplicability to questions of race,[176] and those interested in racial justice have long been skeptical of federalism.

1. The Dominance of the Diversity Model Outside of States. — Having rejected the minority-rule-paired-with-sovereignty model for utterly sensible historical reasons, nationalists gravitate to the opposite pole of democratic design: diversity, which dominates the debate on what a democracy owes its minorities everywhere but the states. We use the term "diverse" to describe decisionmaking bodies that are a statistical mirror of the underlying population — if blacks are 12% of the population, they should be 12% of the decisionmaking body — and often term institutions "integrated" when they contain only a token number of minorities.

Presumably as a result of the talismanic significance of *Brown*, we don't just laud diversity. We are also deeply skeptical of institutions that depart from that vision. That skepticism runs so deep that it is inscribed in our very vocabulary. Our terminology is bimodal; we classify an institution as "diverse" or "segregated." There is no celebratory term like federalism in the context of race. Indeed, we don't even have a word for — let alone a theory about — institutions that are racially heterogeneous but where whites are in the minority.[177] As a result, when racial minorities constitute statistical majorities, we often call those institutions "segregated" and condemn them as such.

Consider an example from the mainstream media. The *New York Times* recently wrote a story on Nebraska's decision to address school failures in Omaha by dividing the city into "three racially identifiable" school districts: one predominantly white, one predominantly black, and one predominantly Latino. What made the story unusual was that the plan's author was Ernie Chambers, the only African American in Nebraska's legislature. The *New York Times* headline? "Law to Segregate Omaha Schools Divides Nebraska."[178] The *Times* condemned majority-minority school districts as segregated. And if Omaha is segregating its schools, who wants to be on the wrong side of *that* fight?

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176 One of the rare scholars to link the two is James Blumstein, who observes that there is "an essential complementarity between the principles of federalism and traditional principles of civil rights." James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1259 (1994). But because he links federalism with sovereignty, he also thinks there is "an inherent tension between [these] norms," *id.*, and considers the notion of national civil rights enforcement to be "a threat to the legal foundation of federalism — the legal seeds of federalism's own self-destruction," *id.* at 1272.

177 For an initial effort to develop such an account, see Gerken, *supra* note 94, which I draw upon in this section.

178 Sam Dillon, *Law to Segregate Omaha Schools Divides Nebraska*, N.Y. TIMES, Apr. 15, 2006, at A9, *available at* http://www.nytimes.com/2006/04/15/us/15omaha.html.

Or consider the Supreme Court's race jurisprudence. In *Shaw v. Reno*,[179] the Court condemned majority-minority electoral districts as "political apartheid."[180] In *Croson*, the Court relied on the great John Hart Ely to hold that a minority set-aside program was more constitutionally suspect because it had been enacted by a black-majority city council.[181]

Lest you think it's just the colorblindness camp that views minority-dominated institutions with skepticism, keep in mind that the same majority-minority districts damned by the Court's conservatives as "balkaniz[ing]"[182] were termed "the politics of the second best" by its liberals.[183] Or consider the terminology used by *every* Justice who wrote in *Parents Involved*, the recent schools case. They all condemned heterogeneous schools where minorities dominated as "segregated."[184]

Setting aside the merits for a moment, it is odd that we so quickly affix the dreaded label *segregation* to institutions where racial minorities dominate. Critical distinctions get lost when we cast these issues as debates about integration versus segregation. The most obvious is that these institutions may be different from the racial enclaves of Jim Crow. The less obvious is that, viewed through the lens of federalism, we might imagine these sites as opportunities for empowering racial minorities rather than oppressing them.

2. Localism as a Double-Edged Sword. — Once we move federalism all the way down, it becomes clear that localism is a double-edged sword. The benefits of minority control can extend not just to Southern racists, but to blacks and Latinos. And yet we continue to look with suspicion upon institutions where racial minorities dominate. Federalism thinks about states as sites of political integration precisely because they allow national minorities to rule. So why don't we think of cities or juries or school committees as sites of racial integration precisely because they allow racial minorities to rule?

Such an account requires us to move not just past sovereignty, but past history, rejecting the assumption that federalism's future can only

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179 509 U.S. 630 (1993).

180 *Id.* at 647. Pam Karlan argues that these decisions reveal a discomfort with "the prospect of African-American control." Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 94–95.

181 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495–96 (1989) (citing John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 739 n.58 (1974)).

182 *Shaw*, 509 U.S. at 657.

183 Johnson v. De Grandy, 512 U.S. 997, 1020 (1994) (quoting BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 136 (1992)) (internal quotation marks omitted).

184 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2746 (2007); *id.* at 2778 (Thomas, J., concurring); *id.* at 2795 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2798 (Breyer, J., dissenting).

reproduce its past. That move depends on two premises. First, while rights are a necessary condition for equality, they may not be a sufficient one. Too often we assume that rights alone will suffice, as if the path to equality moves straight from civic inclusion to full integration. We thus miss the possibility that there is an intermediary stage: empowerment. An empowerment strategy would be fruitless if times had not changed, of course, and civil rights enforcement played a crucial role in bringing about that change. The question, though, is where we go from here.

It should be possible to believe in, even revere, the work of the civil rights movement and still wonder whether a rights strategy, standing alone, will bring us to full equality. Civic inclusion was the hardest fight. But it turns out discrimination is a protean monster and more resistant to change than one might think. We may require new, even unexpected tools to combat discrimination before we reach genuine integration.

Second, this is not your father's federalism. To restate the obvious, my arguments are premised on the notion that it is perfectly acceptable for the national majority to play the Supremacy Clause card whenever it sees fit. While this is not a complete answer, for the reasons discussed below,[185] at the very least the absence of sovereignty substantially mitigates the potential costs associated with local power.

(a) The Hidden Costs of Diversity. — It's hard to miss the appeal of the diversity paradigm. It offers a deeply intuitive vision of fairness. We laud diversity on the ground that racial minorities offer a distinctive view or experience and thus ought to be included in democratic decisonmaking. Those who favor the "politics of recognition" thus wax eloquent on the dignity associated with voice and participation.[186] Given its many virtues, you might wonder why anyone would quarrel with the notion that democratic bodies should "look like America."

But the oddity of this theory for "empowering" racial minorities is that it relentlessly reproduces the same inequalities in governance that racial minorities experience elsewhere. You can see, then, the relevance of federalism, which depends on, even glories in, the notion that national minorities constitute local majorities. And while sovereignty has been invoked to defend Jim Crow, federalism itself has always been understood to be about minority rule, not homogenous enclaves.[187] But, as I said, racial minorities are not the sort of minorities

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185 *See infra* p. 59.

186 *See generally* Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1994).

187 Federalism thus boasts an advantage over consociationalism, *see* Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96 (2004), because geography does not

that typically rule at the state level. As a result, we lack a constitutional vocabulary for talking about the benefits associated with minority-dominated governance when racial minorities rule.

(b) Federalism-All-the-Way-Down and the Fourteenth Amendment. — If we can build a theory about minority-dominated governance at the state level, we can orient that theory around racial minorities' governing at the local level. Let me offer a partial sketch here to show how federalism-all-the-way-down might connect with sizeable chunks of the literature on racial empowerment, equality, and integration.

Equality, of course, is a fiendishly complex and deeply contested idea. In legal circles, some endorse a colorblindness approach; others favor antisubordination. But the two camps routinely borrow from one another, and their adherents can be frustratingly vague about the relationship between means and ends.[188] Rather than parse the debates on what, precisely, equality means, here I'll offer a rough-and-ready working definition for these purposes. Most accounts of equality assume that racial minorities should be "integrated" into the nation's economic, political, and civic life, by which scholars mean that racial minorities should enjoy roughly the same material advantages as whites enjoy, be able to participate fully in governance without the handicap of racial stereotypes or discrimination, and feel as much a part of the polity as whites do. Just as many think that the Reconstruction Amendments further these long-term goals, so too we can imagine federalism-all-the-way-down promoting these ends.

(i) Politics, Economics, and Self-Help. — Consistent with accounts of equality that emphasize its economic and political dimensions, some of the key benefits associated with minority-dominated governance are material. Many have argued that having the representatives of racial minorities at the political table to lend their "voice" or "perspective" results in more enlightened laws. Here I draw upon a more muscular account, one that envisions politics playing a role in promoting economic integration, and economics playing a role in promoting political integration.

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map precisely on to group identity. The fact that federalism in the United States is built on heterogeneous polities, not homogenous enclaves, may allow for cross-cutting identities to develop over time. *See* sources cited *supra* note 52; *see also* Richard H. Pildes, *Ethnic Identity and Democratic Institutions: A Dynamic Perspective*, *in* CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 173, 198–200 (Sujit Choudhry ed., 2008) (arguing that federalism is a useful institutional design strategy for dealing with, and eventually reducing, ethnic divisions).

188 For a mapping of some of these arguments and connections, see generally Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003); and Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470 (2004).

Pam Karlan and Sam Issacharoff have argued that economic progress for African Americans has turned not on the vindication of civil rights (the conventional model in constitutional law), but on business set-asides, affirmative action, and government employment.[189] In their view, those programs came about precisely because blacks were able to elect their candidates of choice in majority-minority districts. "[T]he creation of a black middle class," they write, "has depended on the vigilance of a black political class."[190]

One might even argue that this is the story of integration for white ethnics, as Justice Souter did in his dissent in *Bush v. Vera*.[191] In Souter's view, the Lithuanian and Polish wards in Chicago and the Irish and Italian political machines in Boston helped integrate ethnic groups into the system. They "allowed ethnically identified voters and their preferred candidates to enter the mainstream of American politics . . . and to attain a level of political power in American democracy," something that Souter thinks "cooled" ethnicity's "talismanic force."[192]

Example — Now think about *Croson*, where the black majority city council created a minority set-aside program, only to have it struck down by the Court. There, as I noted above, the Supreme Court relied on Ely in holding that the program was more constitutionally suspect because it was enacted by a black-majority city council.

Were we to follow federalism's lead and cast local governments as sites of racial integration, we could offer a counterweight to the Court's skepticism of racial parochialism. Such an account would push us toward a more rough-and-tumble vision of equality than the rights model offers, one that recognizes the dignity in groups' protecting themselves rather than looking to the courts or the national government for solace. This vision resonates entirely with the lesson of the civil rights movement: rights and power are not substitutes; they are complements.[193] Rights were not "conferred" upon African Americans; they fought for them, pushing reluctant national leaders to do the right thing. A fully theorized account of federalism-all-the-way-down would link that story to an account of localism.

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189 Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 47–50 (2003).

190 *Id.* at 49; *see also* John C. Nye et al., Do Black Mayors Improve Black Employment Outcomes? Evidence from Large U.S. Cities (Apr. 6, 2010) (unpublished manuscript) (on file with the Harvard Law School Library) (citing empirical support for the finding that black employment rates rise during the tenure of black mayors, with the effect particularly pronounced for municipal jobs).

191 517 U.S. 952, 1060–76 (1996) (Souter, J., dissenting).

192 *Id.* at 1074–75.

193 *See* Daryl Levinson, Rights and Votes (unpublished manuscript) (on file with the Harvard Law School Library).

Note the relationship between political power and integration on this view. Political power doesn't just facilitate economic integration. The economic advantages associated with political power exert a gravitational pull on outsiders, bringing them into the system and making them feel part of it. On this view, majority-minority governance gives racial minorities (and, before them, white ethnics) a stake in the system. It affords them the status of insiders even as it acknowledges their identity as outsiders.

One might object that *Croson* is as much about racial self-dealing as racial classification. One need not subscribe to the Court's anticlassification approach, after all, to condemn the use of political access to enrich one's own community. The fact that pork and patronage constitute localism's ugly underbelly raises questions about whether we want to promote a vision of equality that rests on minority-dominated governance.

Promoting integration by equalizing chances to feed at the public trough may seem less attractive than a rights-based strategy, which furthers economic integration by removing the barriers to fair competition. But the rights strategy isn't free from normative complications. It risks treating racial minorities as "objects of judicial solicitude, rather than as efficacious political actors in their own right."[194]

None of this is to say that we should cast aside worries about pork and patronage. But standards of review should be applied uniformly. The Court routinely dismisses pork and patronage as the usual products of pluralist politics under rational basis review.[195] Yet it was markedly alert to the problem of self-dealing in *Croson* when racial minorities ruled.[196] Indeed, it equated what might otherwise have been understood as an effort to level the playing field with pure political graft. After all, Richmond's black community had long been disabled from economic competition through redlining and other discriminatory practices. And if anyone understood the effects of these practices, it was those representing the former capital of the Confederacy.[197] That is precisely the point of Justice Marshall's dissent.[198]

One might fairly respond that the *Croson* majority's alertness to the problem of political self-dealing is due to the fact that race casts what

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[194] Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1332 (2005).

[195] For a survey and a critique, see Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

[196] There was, for instance, no evidence of kickbacks or tainted campaign donations.

[197] City of Richmond v. Croson, 488 U.S. 469, 529 (1989) (Marshall, J., dissenting).

[198] *See id.* at 528–29.

Lani Guinier calls a "neon light" on problems that exist elsewhere.[199] While that is surely the case, the Court's decision also has to do with the absence of a competing narrative of local empowerment. A theory of federalism-all-the-way-down should provide a much-needed normative push in the other direction.

Let me offer an example to test that intuition. When Texas and California become majority Latino, is there any chance the Justices will term those states segregated or view their legislative products with suspicion? The value of minority-dominated governance at the state level is so embedded in our constitutional vocabulary that it would be unthinkable. The same is not (yet) true of the local institutions where racial minorities are far more likely to dominate. Even if a robust vision of federalism-all-the-way-down could not move the "federalist Five" to endorse Marshall's account of Richmond's program, at the very least it should have prevented them from taking Ely's side in the debate.

(ii) Minority Rule and Racial Identity. — Building on Anne Phillips's observation that "[p]olitics is not just about self-interest, but also about self-image,"[200] one might also think that minority rule matters for reasons that have nothing to do with material benefits. We have long thought that participation plays a role in constituting one's civic identity.[201] But those arguments are typically cast in highly individualistic terms, with little thought given to institutional context, let alone crass concerns like who wins and who loses.[202] Viewed through the lens of federalism-all-the-way-down, however, we might think that power and identity are more closely tied than we typically assume.

Federalism would supply grounds for criticizing the vision of minority empowerment that has wholly dominated our discourse on racial equality. It would remind us that the diversity model doesn't just reproduce racial groups' numerical inequality throughout the system, but effectively constitutes racial minorities as political losers on any issue on which people divide by race. The political "script"[203] we afford

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199 *See* Lani Guinier, *The Supreme Court, 2002 Term — Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 189–90 (2003).

200 ANNE PHILLIPS, THE POLITICS OF PRESENCE 79 (1995).

201 *See, e.g.*, BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 119–20, 152 (1984); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 23–33 (1970); IRIS MANION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 92 (1990); Ellen D. Katz, *Race and the Right to Vote After* Rice v. Cayetano, 99 MICH. L. REV. 491, 512–14 (2000); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 478–79 (1989).

202 Gerken, *supra* note 94, at 1156–58.

203 K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, *in* K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 30, 97 (1996).

racial minorities is to be the junior partner or dissenting gadfly on every decision.

Federalism-all-the-way-down, in contrast, turns the tables; it allows the usual winners to lose and the usual losers to win. It thus gives racial minorities the chance to shed the role of influencer or gadfly and stand in the shoes of the majority. Turning the tables allows blacks and Latinos to enjoy the same sense of efficacy — and deal with the same types of problems — as the usual members of the majority. They have an opportunity to forge consensus and to fend off dissenters, to get something done and to compromise more than they'd like.

If the "politics of recognition" theorists are right that granting voice represents an acknowledgment of equal status,[204] federalism-all-the-way-down acknowledges the ability of racial minorities not just to participate, but to rule. In place of the "politics of presence,"[205] we have the politics of power. In place of the dignity of voice, we have the dignity of decisions.

Further, federalism-all-the-way-down ensures that over the course of her civic life, a person of color will experience a political dynamic markedly different from that she experiences in state or federal elections. An African American woman, for instance, might find herself serving on a black-majority jury or school committee. There, she may have an opportunity to privilege different parts of her identity, perhaps disagreeing with other black jurors in a fight that falls along gender lines, or building a voting coalition with white and black committee members based on a shared commitment to social conservatism.[206]

The benefits of turning the tables are not, of course, confined to racial minorities. If we want to move to a Dahlian world of fluid coalitional politics,[207] it might be useful to denormalize whites' political experience by depriving them of the comfort and power associated with their majority status. Everyone, to borrow a term of art from our former president, ought to experience a good "thumpin'."[208]

Note how different this localist vision of minority rule is from the privatized, racially homogenous "safe spaces" that scholars laud and the Constitution protects. Safe spaces address one problem with statistical mirroring — racial isolation. But they do so by pushing the insti-

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204 PHILLIPS, *supra* note 200, at 39–40; *see also* BARBER, *supra* note 201, at 152–55; Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"*, 61 J. POL. 628, 628 (1999).

205 PHILLIPS, *supra* note 200.

206 Gerken, *supra* note 94, at 1150–52, 1175–76 (exploring other values associated with cycling participatory experiences).

207 *See, e.g.*, ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (expanded ed. 2006).

208 William Safire, *After the Thumpin'*, N.Y. TIMES, Nov. 9, 2006, at A33 (quoting President George W. Bush).

tutions where racial minorities rule into the private realm. We thus see the same link between separation and minority power that we see in a sovereignty account of federalism. Sovereignty protects minority power by pushing minorities into a nonfederal realm. Both strategies, in effect, give minorities an exit option. The notion of "turning the tables," in contrast, suggests that racial minorities don't need to be protected from the rough and tumble of politics to succeed. They simply need the same type of voting power that whites typically enjoy — the power of the insider.

One might protest that racial minorities are numerical minorities, and numerical minorities are supposed to lose in a democracy. But that's precisely why federalism matters in this debate: it's a theory about why democracy works better when the usual losers sometimes win and the usual winners sometimes lose.

Moreover, in a world of lumpy residential patterns and statistical blips, ours *is* a world of federalism-all-the-way-down, in which decisionmaking bodies of every sort (school committees and city councils and juries) are dominated by groups of every sort (Italians and Irish, Catholics and Jews, Greens and libertarians). We don't worry about this representational kaleidoscope — let alone term it "segregated" — merely because one group or another is taking its turn standing in for the whole. True integration would mean that the same is true when racial minorities form part of that kaleidoscope.

Example — Think about Ernie Chambers's proposal to create three school districts in Omaha.[209] None of the districts the *New York Times* condemned as segregated was a homogenous racial enclave; each simply was dominated by a different racial group. I want to set aside for a moment whether Chambers's proposal had any chance of succeeding[210] and simply consider whether his stated intention of using majority-minority school districts to address the problem of race and education was as foolish as the *Times* would have us think.

Chambers obviously thought that governance matters to the long-term project of integration.[211] While the conventional view of school

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[209] The next few paragraphs draw from Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007).

[210] Many of the stakeholders in Nebraska certainly thought it was destined for failure. *See* Jeffrey Robb & Michaela Saunders, *School Law Is Dealt First Strike; Judge Sees Major Flaws in LB 1024*, OMAHA WORLD-HERALD, Sept. 19, 2006, at 01A; Jeffrey Robb & Martha Stoddard, *Critics: Breakup Plan Segregates, OPS Would Be Split in Three*, OMAHA WORLD-HERALD, Apr. 7, 2006, at 01A; *NAACP Opposes Plan to Resegregate Omaha Public Schools*, OMAHA BRANCH NAACP (Apr. 18, 2006), http://www.omahanaacp.org/LB1024.htm.

[211] *PBS NewsHour: Plan for Omaha Schools Raises Segregation Concerns* (PBS television broadcast May 31, 2006) (transcript available at http://www.pbs.org/newshour/bb/education/jan-june06/omaha_05-31.html) (quoting Ernie Chambers) ("The real issue is one of power. We believe that the people whose children attend schools ought to have local control over those schools, a concept very familiar with white people. . . . Whenever you give adults, parents, members of the

integration is that the interactions that really matter are inside the classroom, not the PTA, it does not require a great deal of imagination to think that Chambers might have a point. If parental commitment matters to school quality, we might suspect that black and Latino parents would feel more committed to a school where they enjoy the same level of control that is routinely exercised by white parents across the country.

Moreover, in such districts, it would be obvious that representatives of the black and Latino community are doing more than representing their own racial group — they represent the entire district. Political discourse would include the usual stuff of school politics — building, budgeting, and benchmarking, issues over which racial minorities and whites can unite and divide.[212]

Indeed, if we were just a bit more imaginative, we might think of Chambers's project as promoting integration of a different sort. If we were to take a bird's-eye view of the Nebraska school system, we would see a kaleidoscope, with majority-white, majority-black, and majority-Latino communities being "represented" by the school systems they created rather than the legislators they elected.

Here again, the point is decidedly not that the values associated with federalism-all-the-way-down trump the obvious list of worries one might have about Ernie Chambers's proposal. Those values are so substantial, in fact, that I don't even want to venture a guess as to the right answer to these questions. Turning the tables in school governance may undermine more conventional integrative efforts. It may be that — because of the overlay of socioeconomic conditions, or the prevalence of racial discrimination, or the ways in which kids interact — statistical mirroring is the path to genuine integration in this context. It may be impossible to devolve power to localities without devolving funding responsibilities (and thus running into the all-but-insuperable dilemma of economic inequality).

An account of federalism-all-the-way-down doesn't dissolve these problems. But it complicates them by showing that what many would take to be the easiest of questions — whether school districts should "look like America" — isn't as simple as we might have thought.

3. Caveats. — Given how familiar we are with the benefits of diversity, there is little reason to canvass the obvious costs that arise if we abandon it. Nonetheless, there are costs associated with my proposal that are less familiar because we typically don't think of equality

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community a stake in the education of the children who represent the future, they take an interest, they participate in making sure that the schools do as they should.").

[212] *Cf. supra* note 187 (gathering sources on the role federalism plays in forging cross-cutting identities).

in these terms.[213] There is, for instance, a tradeoff between influence and control in this context: when racial minorities are concentrated on some decisionmaking bodies, their numbers will decrease on others. Further, the creation and maintenance of minority-dominated decisionmaking bodies will often require a self-conscious choice by policymakers, thus raising the concerns that are regularly trumpeted by members of the colorblindness camp.[214] And we might think that some sites are simply a forum non conveniens for constituting racial identity.

Most importantly, my account doesn't eliminate the concern that involves some variant of the question, "what about when the local racists do *X*?" The fact that racist decisions won't be shielded by sovereignty is not a complete answer. Decisions can be sticky. And even when they are reversed immediately, they still represent public and authoritative acts that are momentarily blessed as the decision of the polity.

While an account of federalism-all-the-way-down doesn't solve this problem, it shows that the nationalists' account is too one-sided. If we eliminate opportunities for local governance to protect racial minorities from discrimination, we also eliminate the very sites where racial minorities are empowered to rule. We might instead prefer the type of solution we have chosen in the context of federalism: maintaining a decentralized system but fighting out, issue-by-issue, the areas where we think national values cannot be compromised.[215]

Regardless of how one balances these costs and benefits, a robust theory of federalism-all-the-way-down would make it harder to condemn a democratic institution as "segregated" simply because racial minorities enjoy enough votes to control the decision. It will be just as hard to term institutions "integrated" only if they relentlessly reproduce the same numerical inequalities that exist everywhere else. At the very least, perhaps we would not be so quick to condemn Ernie Chambers.

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213 For an in-depth look at these concerns, see Gerken, *supra* note 94.

214 Supporters of a sovereignty account are also making a choice about which minorities matter; that choice is simply concealed by the decision to privilege states as the units of institutional design.

215 *See, e.g.*, Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yeskey, 1998 SUP. CT. REV. 71, 129 ("[T]he Fourteenth Amendment set the parameters of what constitutes a legitimate polity."); Barron, *supra* note 58, at 599–604 (suggesting the limits of "local constitutionalism"); Charlton C. Copeland, Ex Parte Young*: Sovereignty, Immunity, and the Constitutional Structure of American Federalism*, 40 U. TOL. L. REV. 843 (2009) (interpreting *Ex parte Young* as making state sovereignty conditional on loyalty to the federal Constitution).

C. Federalism and Dissent

Our discourse on dissent exhibits the same shortcomings as our discourse on race. Here the statistical integration model also dominates, albeit in a less explicit form. Political dissenters are, by definition, political minorities. Consistent with the diversity paradigm, we typically assume that they should be represented in rough proportion to their population — one lone skeptic among *Twelve Angry Men*, a couple of dissenters on every decisionmaking body.[216]

As with race, we are skeptical of decisionmaking bodies that depart from the diversity model. Ours is a culture that romanticizes the solitary dissenter, but we have no celebratory term like federalism for what happens when local dissenters join together to put their policies in place. Instead, the only terms we have to describe such decisions are negative. Just as we often condemn governing bodies dominated by racial minorities as "segregated," we often condemn governing bodies dominated by dissenters as "lawless" or "parochial."[217] Otherwise, we simply don't consider the byproducts of minority rule to be dissent in the first place. For example, we generally don't use the word "dissent" to describe San Francisco's decision to issue marriage licenses to same-sex couples, or the decision of Dover, Pennsylvania, to teach intelligent design in the school, or the efforts of the Texas school board to rewrite its history curriculum. The people involved in these decisions subscribe to the same set of commitments held by individuals whom we would unthinkingly term "dissenters." But they expressed disagreement not through a blog, a protest, or an editorial, but by offering a real-life instantiation of their views.

It's not just that we deny contestation that takes this form the honorific of "dissent." The very idea of a "dissenter who decides" seems like a contradiction in terms. Even though "Our Federalism" offers countless examples of dissenters wielding local power, our basic understanding of dissent is built around the assumption that dissenters don't have the votes to win. We expect dissenters to speak truth *to* power, not *with* it.

Just as it is odd that we affix the dreaded label "segregation" to institutions where racial minorities dominate, it is odd that we condemn decisions as parochial simply because political outliers dominate. We miss something important when our notion of dissent is confined to the private realm. Here, too, we might imagine a different account, one

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216 For an excellent account of this institutional design strategy, see CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003).

217 Nestor M. Davidson offers the term "lawless localities" in his efforts to critique it. Davidson, *supra* note 58, at 1017–26; *see also* Schragger, *supra* note 67, at 1815 (challenging the "usual parochialism story" that depicts localities as hostile to religious minorities).

that connects federalism-all-the-way-down to the much revered values undergirding the First Amendment.

Despite the marked continuities between the values that federalism and the First Amendment are thought to promote — dialogue, participation, and experimentation — federalism has largely been orthogonal to First Amendment debates. That is because political outliers typically lack the ability to control politics at the state level. With the exception of regional dissenters — who necessarily hold a fair amount of sway at the national level by virtue of their membership in a national party — federalism doesn't do that much for dissenters. As a result, federalism scholars don't think much about dissent,[218] and their First Amendment counterparts have viewed dissent largely through a rights-based, individualist lens rather than through the structural frame that federalism scholars routinely deploy.[219]

Federalism-all-the-way-down would bring the two fields into dialogue with one another. That is because federalism-all-the-way-down allows for what I call "dissenting by deciding" — dissenting through a governance decision rather than private speech or action. And dissenting by deciding can promote the values long attributed to the First Amendment. Indeed, if you work through the main justifications offered for the right to free speech, you will see that dissenting by deciding furthers those ends in different, sometimes competing, and sometimes complementary ways. Because I have canvassed these arguments in detail elsewhere,[220] here I will offer a brief overview and a few, stylized examples to make my point.

1. *The Marketplace of Ideas.* — One of the main reasons we care about the First Amendment's role in protecting dissenters is because

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218 Exceptions, which pursue different arguments from those made here, include Matthew Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1 (1999); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005); Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153 (2009); and Young, *supra* note 36. *Cf.* Amar, *supra* note 36, at 504 ("[S]tate governments in 1798–99 played a role similar to that of the institutional press or the opposition party today: monitoring the conduct of officials in power, and coordinating opposition to central policies deemed undesirable.").

219 While work has been done on the "institutional" dimensions of the First Amendment, it focuses on the practice of (or need for) tailoring First Amendment doctrine to particular institutions and is thus different from the arguments I make here. *See, e.g.*, Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821 (2008); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999); Paul Horwitz, Grutter's *First Amendment*, 46 B.C. L. REV. 461 (2005); Rosen, *supra* note 218; Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999); Winkler, *supra* note 218; *see also* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995).

220 *See generally* Gerken, *supra* note 79.

dissent contributes to the marketplace of ideas.[221] Dissenting by deciding contributes to the marketplace of ideas too; it just does so in a different way.

For the marketplace of ideas to work, dissent must be visible. Dissenting by deciding offers a quite different type of visibility to outlier views than free speech does. On the conventional account of dissent, would-be dissenters typically have two choices when they take part in governance: a dissenter can persuade the majority to issue a decision he can join, or a dissenter can speak out against a decision he can't join. In the first instance, dissent is quite visible to members of the decisionmaking body but largely invisible to those outside of it. In the second instance, dissent takes on a familiar cast. It comes in the form of an argument, not a decision, and is understood to reflect the views of private individuals, not the public body making the decision.

Dissenting by deciding, in contrast, allows dissenters to move from the abstract to the concrete. The form that dissent takes is public and authoritative, not particular and private.

Consider, for instance, how different San Francisco's efforts to marry same-sex couples looked from the bread and butter activities of other proponents of gay marriage. The city made the case for same-sex marriage in a way that abstract debate could never achieve. Beamed into all of our television sets were pictures of happy families that looked utterly conventional save for the presence of two tuxedos or two wedding dresses.

San Francisco, for good or for ill, remapped the politics of the possible, something that allowed it to elicit and shape majority preferences. For instance, the city's decision told us something about where same-sex marriage fell on Americans' priority list. To be sure, when asked in the abstract — yes or no to gay marriage? — most people would say no.[222] But San Francisco taught us that same-sex marriage was not an issue important enough to get people on a bus to protest the city's decision, and that is something we could not possibly have learned from a theoretical debate or an opinion poll.

San Francisco's action was also public and authoritative, not particular and private. It was the decision of a mayor elected by a het-

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[221] The touchstone for this argument is JOHN STUART MILL, ON LIBERTY 16 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859). For work developing these arguments, see generally ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 559–66 (1969); THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1967); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995); and R. George Wright, *A Rationale from J. S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149.

[222] News Release, Pew Research Ctr. for the People & the Press, Most Still Oppose Same-Sex Marriage 11 (Oct. 9, 2009), *available at* http://pewforum.org/uploadedfiles/Topics/Issues/Gay_Marriage_and_Homosexuality/samesexmarriage09.pdf.

erogeneous community, not the private plea of a homogenous enclave. The stand-in for the gay marriage debate was an ambitious, heterosexual politician trying to curry favor with an electorate where gays and lesbians are in the minority. All of this might help shift the frame for gay marriage away from a debate about identity toward a debate about ideas.

Although dissenting by deciding has its benefits, there are costs as well.[223] While most of this Foreword leaves aside the costs associated with federalism-all-the-way-down because they are so familiar, here those costs may be less obvious because we don't think of dissent in these terms. To offer a few examples, a decision may be an unwieldy vehicle for expressing a dissenting view. Dissenters may be forced to pour their ideas into a narrow policy space rather than presenting them in their full form. Indeed, decisions are sometimes accompanied without arguments (jury verdicts, for instance), a fact that may render a protest illegible to outsiders. Similarly, while decisions may help elicit and shape majority preferences, that is not always a good thing for a dissenter's cause.[224] There will often be an inverse relationship between the likelihood that everyday citizens *can* influence the decision and the likelihood that the decision *will* influence ongoing debates; decisionmaking bodies lower down the organizational chart may be closer to the people but less likely to catch the attention of outsiders.[225] Finally, there is a tradeoff between influence and control in these contexts; concentrating dissenters in a small number of decisionmaking bodies prevents us from spreading them out across others.[226]

2. Dissent, Self-Governance, and Self-Expression. — Consider another example of the ways in which federalism-all-the-way-down furthers the same values as the First Amendment. Dissent has long been thought to promote self-governance, ensuring that citizens possess the information they need to make decisions.[227] Dissent has also been

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223 For a more developed account, see Gerken, *supra* note 79.

224 *See generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279 (2005); Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994). *But see* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

225 *See* Gerken, *supra* note 79, at 1762–64; *see also* Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 899–900 (2006) (discussing tradeoff between salience and access).

226 Gerken, *supra* note 94, at 1124–42.

227 Alexander Meiklejohn has done the seminal work on the relationship between speech and self-governance. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (Greenwood Press 1979) (1960). Contemporary scholars of many stripes have also written in this vein. *See, e.g.*, OWEN M. FISS, THE IRONY OF

cast as a crucial form of self-expression.[228] These two theories of the First Amendment have largely run on parallel tracks in the literature.[229]

Because dissenting by deciding blends elements of self-governance and self-expression, it allows us to draw new connections between them. For instance, under the self-governance model, dissent matters because it helps people make decisions. Dissenting by deciding doesn't just influence the decision; it *is* the decision. Yet, it's a decision intended to influence future decisions.

Similarly, those who view dissent as an important form of self-expression have typically conceived of identity in private and often individualist terms.[230] Dissenting by deciding, however, allows dissenters to express themselves in a public, collective act. If we constitute our civic selves by participating in governance,[231] federalism-all-the-way-down offers unusual sites for forging civic identity. We value conventional dissent in part because it builds ties between dissenters and the polity, giving dissenters a sense that they have had a "fair shake" in the process. Dissenting by deciding goes one step farther, offering dissenters the chance not just to participate, but to rule. One might thus think that, as with race, minority rule of this sort could help knit political outliers into the larger community.

FREE SPEECH (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300–01 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27–28 (1971); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416 (1986); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 316 (1992).

228 C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 165–78 (1986); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 93 (1990); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990–96 (1978); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 232–37 (1992); *see also* MILL, *supra* note 221, at 16.

229 For efforts to knit the two theories together, see Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3–5, 39 (2004); Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587, 2601–08 (2007); Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1524, 1527 (1997) (reviewing OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996)); and Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1350–70 (2009).

230 For a critique along these lines, see SHIFFRIN, *supra* note 228, at 90–96; Nan D. Hunter, *Escaping the Expression-Equality Conundrum: Toward Anti-Orthodoxy and Inclusion*, 61 OHIO ST. L.J. 1671 (2000); and Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000).

231 *See* sources cited *supra* note 201.

Dissenting by deciding also represents an intriguing blend of loyalty and rebellion. It fuses an act of governance with an act of contestation. When an individual dissents by deciding, she simultaneously stands in for the polity at the same moment that she challenges it. Dissent that takes this form thus bears some resemblance to Michael Walzer's depiction of civil disobedience as a form of partial rebellion, one that "builds loyalty not only toward the state but also against it."[232]

Moreover, when compared to free speech, the decisions dissenters render may seem simultaneously more radical and more incremental. Dissenters are turning the majority's power against itself. But dissenting by deciding may well tame the rebellious possibilities associated with dissent in the long run, as it requires dissenters to pour their energies and arguments into a rather narrow policy space. Think about the movement to bring religion into the school. Dissenters have moved from teaching the Creation to "teaching the controversy."

One might, of course, worry about the other side of localism's double-edged sword — that those in power will oppress dissenters within their own dissenting community, just as Southern racists oppressed racial minorities in defiance of a national majority. This is clearly a substantial cost, though it is often mitigated in this context. That's not just because the national government has provided a floor of basic rights, but because when minority rule is sheared of sovereignty, the national majority can reverse local majorities when it chooses to do so, as I discuss in greater detail in the next section. As with the question of racial oppression, shearing minority rule of sovereignty does not eliminate the problem. At the very least, however, an account of federalism-all-the-way-down suggests that the nationalist account is too one-sided. Balanced against the risks of local oppression are the benefits associated with maintaining an alternative channel for dissent. The democratic case against localism, then, is considerably more complex than the easy equation of localism with parochialism might suggest.

3. Why the Principal-Agent Problem Isn't Always a Problem. — Any defense of dissenting by deciding necessarily runs one into a central worry nationalists have about conventional federalism. While state experimentation is a celebrated feature of federalism, states can do a good deal more than set policy within a range acceptable to the national majority. States can challenge, thwart, even defy the decisions of the national majority. They can pass a law the federal government refused to pass, as did California in enforcing pollution man-

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232 Michael Walzer, *The Problem of Citizenship*, *in* OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 203, 220 (1970).

dates.[233] Or they can refuse to implement law the federal government has passed, as states did with environmental enforcement mandates.[234] States can use federal welfare monies to build a program that will ultimately serve as a model for dismantling the federal system, as did Michigan and Wisconsin.[235] Or they can quietly administer a federal program in the way that they see fit, as with Social Security and OSHA.[236] The same, of course, is true of local institutions, which are more likely to be dominated by political outliers.

That federalism creates opportunities for resistance and rebellion has typically been treated as an uncomfortable fact. It is something that nationalists might loosely describe as a principal-agent problem.

As a conceptual matter, the notion of sovereignty defines away the principal-agent problem; it tells us that the federal government isn't the principal in such situations. But nationalists will have none of this. They generally believe that the nation does or should possess ultimate authority, and they worry when sovereignty shields state decisions, no matter how abhorrent, from reversal. Moreover, in the many areas where states and localities carry out federal programs, the federal government *is* the principal even on a sovereignty account.

As a result of their attachment to sovereignty, proponents of federalism have had an uneasy relationship to the principal-agent problem. When they aren't offering an apologetic sidebar on Jim Crow, they provide a rather ambivalent case for it. Rather than defending state resistance directly, academics tend to focus on the indirect possibilities associated with this phenomenon.[237] Most often, they implicitly fold the federal-state tussles that arise from rebellious state policymaking into broader arguments about "dialogue."[238] Even as they depict federalism as "dynamic" or "iterative," they cast the exchanges between state and national officials as informational, and their baseline assumption is that, at the end of the day, federal-state relations remain "cooperative."[239]

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233 *See* Bulman-Pozen & Gerken, *supra* note 107, at 1277.

234 *See id.* at 1276 n.64.

235 *See id.* at 1274–76.

236 *See supra* note 129.

237 Some argue that it is a strategy for diffusing power and creating more room for negative liberties. *See, e.g.*, Baker & Young, *supra* note 2, at 138–39. Others argue that it allows states to compete with the federal government to be more protective of rights in a virtuous race to the top. *See* Amar, *supra* note 108, at 1428, 1492–1519; *see also* Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1251–53 (2004).

238 If David Shapiro offers the seminal account of this idea, SHAPIRO, *supra* note 2, Robert Schapiro offers the most developed, SCHAPIRO, *supra* note 17.

239 *See supra* notes 50, 55, and sources cited *supra* notes 42–48. A noteworthy exception is Cover & Aleinikoff, *supra* note 120, which depicts a more muscular, conflict-ridden form of dialogue with less determinate results.

But dialogue is too anodyne a term to attach to this phenomenon, as it suggests that states are simply engaging the federal government in a polite conversation, ready to offer their docile obedience if the center rejects their claims. Rebellious state policymaking is distinct from the dominant modalities of federal-state dialogue — speaking and lobbying. What many federalism scholars call "dialogue," in short, is often a fight.

By orienting constitutional theory around federalism without sovereignty, we might push work on the principal-agent problem in a different direction. Federalism scholars pull their punches on the principal-agent problem because of the high costs of sovereignty. After all, guaranteeing national minorities the ability to speak freely against the federal government is one thing. Guaranteeing them the right to legislate freely, utterly protected from reversal, is quite another.

Freed from the dilemma of sovereignty, we could focus on the reasons why the principal-agent problem isn't always a problem. While the phenomenon certainly has its costs — so well documented that it is universally described as a "problem" — it gives states and local institutions the power to set the agenda, to force majority engagement, and to generate democratic churn. Federalism-all-the-way-down, in other words, makes space for the democratic possibilities associated with state and local resistance while avoiding its heaviest costs.

(a) The Case for Valuing the Principal-Agent Problem. — We value dissent at least in part because it forces us to engage with other ideas, to reflect critically on our own practices, perhaps even to change our minds. Undergirding these arguments is the idea that preferences aren't fixed, but can be elicited and shaped by outlier views.

Free speech has long been thought to be a sufficient channel for dissent. But the right to speak freely is not always enough to force the majority to engage. Indeed, the safest course for the majority will often be radio silence. Think about the universal image of an individual exercising his First Amendment rights — someone standing on a soap box. Most people simply walk on by. When dissenters lack the power to set the agenda, they cannot spark the productive conversations that First Amendment scholars envision. Similarly, when states and localities lack the power to set the agenda, they cannot spark the productive conversation that federalism scholars envision.

If you want to set the agenda, issuing a decision that thwarts the governing majority's will is a pretty good way to force it to engage. Indeed, it may sometimes be the only practical strategy for doing so (other than its private cognate, civil disobedience, which similarly forces majority engagement through action). Precisely because decisions impose externalities that speech generally does not, dissenters can push the majority to try to reverse them. And efforts at reversal generally require engagement. Agenda-setting power, in short, may be the

most powerful weapon that dissenters can possess.[240] And that's precisely what federalism-all-the-way-down provides.

If you think that our political system already has a sufficient amount of deliberative froth, there is little point in giving dissenters the power to set the agenda. But if you believe that our national system is often locked up — that issues simply don't get on the national agenda because elites have no interest in debating them (think immigration reform or gay rights) — then you might think that federalism-all-the-way-down has its attractions.[241] Both sides of the debate over immigration, for instance, have struggled to get the federal government to act. What seems to have turned the tide? Arizona's recently enacted immigration law, which has galvanized national debate and forced national elites to engage.[242]

None of this is to say that efforts by the agent to challenge the principal are without costs. Moving federalism beyond sovereignty doesn't eliminate those costs, but it reduces them. The cost of federalism-all-the-way-down is not, as with federalism, a permanent departure from majority preferences, but the expenditure of political capital to stamp out the dissenters' local programs.

(b) Is the Game Worth the Candle? — The conventional view is that a decision vulnerable to reversal can't be remotely as important for national debate as one protected by sovereignty. After all, even if a decision is public and authoritative rather than private and particular, what good does it do to enact a policy and have it reversed quickly by the national majority?[243]

If you subscribe to a robustly dialogic vision of federalism, then the power of the servant can be just as attractive a model for generating debate as the power of the sovereign; we can even imagine the two

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[240] *Cf.* Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 J. POL. PHIL. 74, 80–83 (2005).

[241] Others have made more granular versions of this argument. *See, e.g.*, E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326–33 (1985) (discussing states' role in triggering federal environmental policymaking); Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1017 (2001) (arguing that state involvement in foreign affairs can "overcom[e] bureaucratic inertia at the central level of governance"); Hills, *Against Preemption*, *supra* note 51 (discussing preemption doctrine and the role of business interests in setting Congress's agenda).

[242] *See* Julia Preston, *Justice Dept. Sues Arizona Over Its Immigration Law*, N.Y. TIMES, July 7, 2010, at A3.

[243] There may be a tension between the claims I make here on the relationship between minority rule and agenda setting and those I make in section IV.B on the relationship between minority rule and political integration. After all, having their decision immediately reversed may make racial or political minorities feel less invested in the political process. Or it might not. Political spankings can also pull people still deeper into the process. Consider, for instance, the path that the Christian Right took into politics. National defeats galvanized political organizing. Thanks go to Reva Siegel for posing this question.

working in tandem. That's because being outside the system can be a handicap if you want to set the agenda. Just as the national majority can ignore dissent that takes the form of private speech, it can ignore dissent that takes the form of a decision outside the national sphere. An integrated policymaking regime, in contrast, provides more opportunities for interaction and thus for generating democratic friction.

Example — Think about the difference between two same-sex marriage decisions that occurred at roughly the same time: one in San Francisco, the other in Massachusetts. Massachusetts's decision was protected by state sovereignty and thus shielded from reversal by the national majority. When San Francisco began licensing same-sex couples, in contrast, it could make no claim of sovereignty. Its decision could be reversed, and it was.

Surely most people think that Massachusetts made the decision that really mattered for getting same-sex marriage on the national agenda. Sovereignty protected that decision from reversal, something that gave the state the power to continue with the experiment, to provide a real-life instantiation of its views that stands today. That is no doubt extremely important in shaping the ongoing debate. But notice that while Massachusetts's decision was initially condemned, it dropped out of the ongoing national discussion until this summer. Had Massachusetts been fully separate from the United States — had it been France or the Netherlands — one wonders whether the decision would have elicited any response in this country.

San Francisco, in contrast, made the most of its status as a servant. Consistent with a sovereignty approach, Massachusetts's leadership tried to confine the effects of its decision to its own territory by limiting same-sex marriage licenses to state residents.[244] San Francisco's leaders, however, leveraged the City's status as one actor embedded in a larger system by issuing marriage licenses to anyone willing to make the trip to California. This choice forced political actors in other states — who had previously ducked the issue — to take a stand on whether those marriages were valid.[245]

Because San Francisco was a servant, not a sovereign, it could be reversed . . . and reversed and reversed and reversed. But, here again, one wonders whether San Francisco has had more of an effect on this

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[244] Pam Belluck, *Romney Won't Let Gay Outsiders Wed In Massachusetts*, N.Y. TIMES, Apr. 24, 2004, at N1, *available at* www.nytimes.com/2004/04/25/us/romney-won-t-let-gay-outsiders-wed-in-massachusetts.html. The state ultimately abandoned this policy and ended up marrying same-sex couples from out of state. Katie Zezima, *Massachusetts: Same-Sex Couples from Other States May Now Marry*, N.Y. TIMES, Aug. 1, 2008, at A13, *available at* http://query.nytimes.com/gst/fullpage.html?res=9B03E1D6103AF932A3575BC0A96E9C8B63.

[245] *See* David Von Drehle & Alan Cooperman, *Same-Sex Marriage Vaulted Into Spotlight*, WASH. POST, Mar. 8, 2004, at A1.

debate precisely because it has repeatedly forced the majority to engage. Efforts to shut down the City's efforts prompted two high-profile state court battles, backlash in the form of an initiative, and backlash to the backlash initiative. The City is now engaged in a third, high-profile court case that seems destined for the Supreme Court. And note that Massachusetts has recently reemerged in this debate only because a judge held that the federal government could not deny marriage benefits to same-sex couples married within the state,[246] thus leveraging Massachusetts's status as an integrated part of the federal regime to force the national government to engage. Should this effort be short-circuited — as many expect it will — then it is hard to tell whether, in the end, Massachusetts will look like the solitary dissenter on the soap box, precisely because it stands outside the system and cannot be reversed, whereas San Francisco, playing the servant's role, will ultimately do more to push the same-sex marriage debate forward in the long run.

Finally, note the connection between these arguments and those put forward in Part III about the power of the servant. Here again, we see the same relationship between exit and voice, outsiders and insiders. It is precisely when states and localities are integrated into a national scheme — rather than standing separate and apart from it — that they have the power to set the agenda, to force a reluctant national elite to engage, and thereby to ensure that the federal-state dialogue lauded by federalism actually takes place.

Note also the loose connection between the First Amendment, on the one hand, and a sovereignty account, on the other.[247] The obvious worry about dissenting by deciding is that if we don't shield dissenting decisions from immediate reversal, this variant of minority rule doesn't amount to much. That's precisely why sovereignty has so much pull.

On the rights side of the Constitution, the idea of formal protections for personal autonomy — the rough individual cognate to state sovereignty — also has lots of pull. The notion that rights are necessary to protect dissent is, of course, a major justification for the First Amendment. Just as sovereignty creates protected zones where minorities can freely rule, the First Amendment creates protected zones where individuals can freely speak. Both provide minorities with an exit option of sorts.

Those zones of autonomy come at a price in both contexts. In conventional federalism, the price of state sovereignty is separation from the national sphere. Under the First Amendment, the price of indi-

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[246] Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 253 (D. Mass. 2010).

[247] I briefly draw a similar parallel on the race front. *See supra* pp. 56–57.

vidual autonomy is separation from the public sphere. The First Amendment protects the power of dissenters to act or speak in concert, provided they do so solely on their own behalf. Federalism-all-the-way-down offers a different tradeoff. It allows dissenters to make decisions in the public realm but does not protect them from reversal. It offers dissenters voice, not exit; the status of insiders, not outsiders; the power of the public servant, not the private sovereign.

D. Why the Nationalists Need to Move Beyond Sovereignty as Well

The claim that we should be more comfortable with division, debate, and deliberative froth does not, of course, answer the fiendishly difficult question: how much is enough? The question is a challenge for virtually any theory, be it nationalist or federalist. Once one identifies the values a given institutional design strategy promotes, the calibration question necessarily presents itself. While this Foreword begins to identify a set of costs and benefits that have been overlooked in the debate thus far, it does not provide a new scale for balancing them against the well-known pros and cons of federalism. Although this may not be enough to resolve the calibration question, it is enough to offer without apology. Indeed, as noted above,[248] costs and benefits can only be sensibly assessed institution by institution, domain by domain, issue by issue, and group by group. The goal of this Foreword is not to offer this sort of granular analysis, but simply to outline a set of benefits that typically don't get factored into those equations.

The nationalist account offered here also requires a move beyond sovereignty. Just as this Foreword has separated two arguments that usually travel together — minority rule and sovereignty — it pairs two others that typically stand apart.[249] Even as I side with the nationalists in thinking that it is perfectly acceptable for national majorities to play the Supremacy Clause card, I argue that a national system can withstand more division and dissent than typically imagined. My account elides the principal-agent distinction, privileges messy overlap over clear jurisdictional lines, and depicts power as fluid, contingent, and contested. It assumes that even the Supremacy Clause won't always be a trump card; sometimes it will simply be the center's opening play. All of these features push up against a vision of national power that is as deeply rooted in a sovereignty account as is federalism's account of state power.[250]

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[248] *See supra* pp. 10–11.

[249] I am grateful to Richard Briffault for suggesting this point.

[250] Robert Cover and Alexander Aleinikoff make precisely this argument, noting that the conventional federalist and nationalist positions rest on "a sense that conflict and indeterminacy are dysfunctional," a position they argue "suffers from the lawyer's disease of sovereignty." Cover & Aleinikoff, *supra* note 120, at 1047–48.

While the nationalists routinely rebuke federalists for being too attached to sovereignty, they often share the same intellectual traveling companions.[251] They tend to write about federalism as if it were an entirely hierarchical enterprise, where the key question is who gets to play the trump card rather than how the center and periphery interact. Like the champions of state sovereignty, nationalists often privilege clean jurisdictional lines over messy overlap. Arguments in favor of preemption, for instance, usually dwell on the importance of uniformity, accountability, and clear lines of authority.[252]

Similarly, the nationalist assumption that power is located in the "principal" — rather than shared, partial, and contingent — mirrors the image of power held by most federalists, one that involves presiding over one's own empire.[253] Consider, for instance, the debate over the safeguards of federalism. The question is almost inevitably framed as a fight about which national institution should be vested with the power to strike the federal-state balance: Congress,[254] the Executive,[255] or the Court.[256] This focus on the power of the principal conceals just how much of federalism is simply negotiated by federal, state, and local actors.[257] And even students of the gloriously messy parts of federalism — areas where the states and federal government regulate together — display their sovereignty bent when they celebrate federal-state interactions as "cooperative" and treat the principal-agent problem as a problem to be solved rather than a feature to be celebrated.

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[251] This point has been made by a number of scholars. *See, e.g.*, SCHAPIRO, *supra* note 17, at 65–70; Schapiro, *supra* note 124, at 818; Kathleen M. Sullivan, *The Supreme Court, 1994 Term — Comment: Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 97, 103 (1995); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139 (2001); *cf.* Hills, *supra* note 20, at 818, 831–47 (tracing intellectual roots of the nationalist variants of dual federalism); Young, *supra* note 2, at 23 (examining the role of sovereignty in the Rehnquist Court's "federalist revival").

[252] *See, e.g.*, SCHAPIRO, *supra* note 17, at 113.

[253] Mark Rosen describes preemption doctrine as "unilateralist" because it "takes account of only one of the institutions whose interests are at stake: the federal government." Mark D. Rosen, *Contextualizing Preemption*, 102 NW. U. L. REV. 781, 785 (2008).

[254] *See, e.g.*, Choper, *supra* note 111, at 1557 (advocating leaving this question to "the political branches"); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559–60 (1954).

[255] *See, e.g.*, Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1939–41 (2008); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2047–48 (2008); *cf.* Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2130 (2009) (proposing measures to ensure agencies take state interests into account).

[256] *See supra* notes 13, 111 (discussing pro-sovereignty scholars and process federalists who endorse some form of judicial review).

[257] *See* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. (forthcoming 2011) (manuscript at 5) (on file with the Harvard Law School Library).

There just aren't that many nationalists who share Robert Cover's sensibilities.

In order to get a more concrete sense of the hold sovereignty continues to exert on both federalist and nationalist accounts of power, consider the marked similarities between the Supreme Court's commandeering and Commerce Clause decisions, on the one hand, and its preemption decisions, on the other. The two sets of cases are typically understood to be in tension with one another, as one favors state power and the other national. Scholars thus wonder whether the Federalist Five are being inconsistent or driven by other commitments when they decide preemption cases.[258] But the sensibilities underlying these decisions are quite similar. When the Court wears its state sovereignty hat, as with the commandeering and Commerce Clause cases, it privileges clear jurisdictional lines and insists that states cannot be forced to administer the federal empire.[259] When the Court wears its national sovereignty hat, as with preemption cases, it likewise privileges clear jurisdictional lines and insists on the ability of the principal to ensure its commands are carried out.

V. CONCLUSION

It's not just sovereignty doing the work here, of course. Part of the reason that we find it so difficult to celebrate the democratic dimensions of federalism-all-the-way-down is that most of the institutions that fall within its ambit are administrative. All of our Weberian assumptions about the way government is supposed to work come into play.[260] Even in an age when federal agencies are constantly under pressure to democratize, we are reluctant to celebrate the democratic dimensions of federalism-all-the-way-down. Instead, we laud administrative efficiency, worry about local incompetence, and have a strong impulse to quash local rebellion.[261]

A democratic defense of federalism-all-the-way-down suggests that we miss half the story when we view conflict, resistance, and parochialism with such suspicion. The costs associated with these phenomena are real, but they are the flip side of the democratic benefits provided by federalism-all-the-way-down.

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[258] *See, e.g.*, Chemerinsky, *Empowering States*, *supra* note 50, at 1315, 1328; Cross, *supra* note 167, at 1309–10; Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 469, 470–71, 488 (2002); *see also* Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906, 921 (2006) (citing additional sources).

[259] *See, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997); United States v. Lopez, 514 U.S. 549, 576–77 (1995) (Kennedy, J., concurring).

[260] Though here, too, one might be able to trace these impulses back to a sovereignty account.

[261] Thanks to Charlton Copeland and Don Herzog for pressing me on this point.

When we talk about democracy, we routinely celebrate the idiosyncratic dissenter, the nobility of resistance, the glory in getting things wrong, and the wild patchwork of views that make up the polity. When we turn to governance, however, we crave certainty, efficiency, and clear lines of authority. What is celebrated in the private realm is condemned in the public one.

It should come as no surprise that Tocqueville's democracy fails to produce Weber's bureaucracy. And perhaps rather than spending so much time worrying about that failure, we might occasionally celebrate the fact that the administrative arrangements produced by "Our Federalism" offer such an intriguing alternative to — perhaps even an essential part of — our nation-centered democracy.[262]

This Foreword represents a step in that direction. It orients federalism theory around the parts of "Our Federalism" where sovereignty is not to be had — where minorities are insiders, not outsiders, and thus able to exercise a muscular form of voice rather than depend on some variant of exit. Such an account pushes our vision of federalism all the way down. It offers a "checks and balances" model of how the center and its variegated periphery interact in this messy structure of overlapping institutions — an account of the power of the servant to compete with existing accounts of the power of the sovereign. And it develops a centripetal account of "Our Federalism," one that celebrates the role that division and discord play in forging a unified national polity.

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[262] For a sampling of arguments along these lines, see Gerald E. Frug, *Administrative Democracy*, 40 U. TORONTO L.J. 559, 562 (1990); Hills, *Is Federalism Good for Localism?*, *supra* note 59, at 214–17; and Ruger, *supra* note 67, at 1031.